**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2000

**Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2762-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and MAXINE A. WHITE, Judges. *Affirmed.*

¶1 SCHUDSON, J.[1] Charles Jones appeals from the judgment of conviction for violation of a domestic violence injunction, following a six-person

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

jury trial, and from the order denying his postconviction motion for a new trial. He argues: (1) his conviction was obtained in violation of art. I, § 7 of the Wisconsin Constitution,[2] because his trial was before a six-person jury under the statute subsequently declared unconstitutional in ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998);[3] (2) ***Hansford*** should apply retroactively to provide him a new trial with twelve jurors; and (3) because he did not personally waive his right to a twelve-person jury trial, and because he challenged the six-person jury in his postconviction motion, his failure to object to a six-person jury before his trial should not be deemed a waiver of his challenge to the six-person jury.

¶2 This court concludes that the recent supreme court decision in ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, controls. Because

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[2] Article I, § 7 of the Wisconsin Constitution states:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public *trial by an impartial jury* of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

(Emphasis added.)

[3] The supreme court explained that, at the time it decided ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), the statutory status was as follows:

> Wisconsin Stat. § 756.096(3)(am) [1995-96] states: "A jury in [] misdemeanor case[s] shall consist of 6 persons."
>
> The legislature enacted Wis. Stat. § 756.096(3)(am) pursuant to 1995 Wisconsin Act 427. Although § 756.096(3)(am) has been repealed, the language providing for six-person juries in misdemeanor cases is still in effect and is now codified in Wis. Stat. § 756.06(2)[(am)] (1997-98).

Id. at 229 n.2.

the supreme court rejected the very arguments Jones now presents, this court affirms.

I. BACKGROUND

¶3 The facts relevant to resolution of this appeal are not in dispute. Jones was convicted in a trial before a six-person jury, under the statute mandating six-person juries in misdemeanor cases. He did not object to being tried by a six-person jury. In ***Hansford***, however, the supreme court concluded that, under art. I, § 7 of the Wisconsin Constitution and four Wisconsin Supreme Court decisions, "the right to a 12-person jury extends to all criminal defendants, regardless of whether they are charged with misdemeanor or felony offenses." ***Hansford***, 219 Wis. 2d at 241.

¶4 Recently, in ***Huebner***, the supreme court addressed the primary issue underlying Jones's appeal: whether, in the absence of an objection to a six-person jury, ***Hansford*** applies retroactively to invalidate a conviction by a six-person jury. Based on ***Huebner***, this court concludes that because Jones did not make a constitutional objection to the six-person jury before his trial, ***Hansford*** does not invalidate his conviction.

II. DISCUSSION

¶5 In ***Hansford***, the defendant had objected to the six-person jury in his case, specifically contending that the six-person misdemeanor jury statute was unconstitutional under art. I, § 7 of the Wisconsin Constitution. ***Hansford***, 219 Wis. 2d at 232. Concluding that the defendant was correct, the supreme court reversed his conviction. ***Id.*** at 243. In ***Huebner***, however, the defendant, Huebner, did not object to the six-person jury before trial. ***Huebner***, 2000 WI 59

at ¶3. Thus, in ***Huebner***, the supreme court addressed whether ***Hansford*** applied retroactively to invalidate the conviction by a six-person jury in the absence of a defense objection to the six-person jury. ***Huebner***, 2000 WI 59 at ¶5.

¶6 Concluding that retroactive application of ***Hansford*** was not required, the supreme court declared:

> Huebner has not lost his right to a jury trial. A trial by six jurors is not equivalent to no jury trial at all. Huebner received an otherwise fair and error-free trial by six jurors.
>
> Nothing in ***Hansford*** suggests that having a six-person jury trial is equivalent to having no jury trial at all. ***Hansford*** did not state that a six-person jury is procedurally unfair or that it is an inherently invalid factfinding mechanism….
>
> We find nothing in ***Hansford*** to support the conclusion that the difference between a six-person jury trial and a twelve-person jury trial is so fundamental that a six-person jury trial, which was conducted without objection under the express authority of a statute, is automatically invalid.

Id. at ¶¶17-19.

¶7 Huebner, like Jones in the instant case, conceded that he had made no objection to the six-person jury before trial. ***Id.*** at ¶8. On appeal, however, he argued that under the retroactivity analysis of the United States Supreme Court's decision in ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987), adopted by the Wisconsin Supreme Court in ***State v. Koch***, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993), ***Hansford*** should apply to invalidate his conviction, despite his failure to object. ***Huebner***, 2000 WI 59 at ¶9. The supreme court disagreed, concluding that because Huebner had "made no constitutional objection at the trial court level," he had waived or forfeited his constitutional claim. ***Id.*** at ¶¶10-11.

¶8 Jones argues, however, that his case is distinguishable from ***Huebner***. Jones explains that he, unlike Huebner, challenged the six-person jury

in his postconviction motion. Further, Jones notes, the three-justice dissent in ***Huebner*** deemed Huebner's "objection before the circuit court, in a motion for post-conviction relief" to be sufficient to preserve the issue for appeal. ***Id.*** at ¶83 (Abrahamson, C.J., Bradley and Sykes, JJ., dissenting). The dissent, however, is a statement of what the law is not. ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Indeed, in ***Huebner***, the majority explicitly applied the waiver rule in rejecting Huebner's argument that it should "overturn his conviction because of a procedural defect to which he did not object *at the time of trial*." ***Huebner***, 2000 WI 59 at ¶¶30-32 (emphasis added).

¶9 Still, Jones argues that because he did not *personally* enter a knowing, intelligent, and voluntary waiver of his right to a twelve-person jury, his conviction must be reversed. Once again, he points to the ***Huebner*** dissent, this time for its observation that "the right to trial by a twelve-person jury is a right that cannot be waived except by a defendant's personal oral or written waiver on the record." ***Id.*** at ¶84 (Abrahamson, C.J., Bradley and Sykes, JJ., dissenting). He maintains that "[t]he reasoning of the three dissenting justices in ***Huebner*** is a sounder expression of the law as it applies to the facts of the case at bar than the reasoning of the three-justice majority in ***Huebner***." Once again, however, the dissenting opinion is not a statement of the law. ***Perry***, 181 Wis. 2d at 49. And once again, the ***Huebner*** majority explicitly addressed the issue Jones now presents; it rejected Huebner's challenge "that he could not forfeit his right to a twelve-member jury *in the absence of an express, personal waiver*." ***Huebner***, 2000 WI 59 at ¶¶15-26 (emphasis added).

By the Court.—Judgment and order affirmed.[4]

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

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[4] This court acknowledges that two of the issues Jones presents—whether, in the absence of an objection before trial, a postconviction motion challenging a six-person jury preserves the issue for appeal, and whether, in the context of a challenge to a six-person jury, a *personal* waiver of a twelve-person jury is required to constitute waiver—were decided by a 3-1-3 divided supreme court. ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727. This court also acknowledges that neither of those issues was addressed in the concurring opinion. ***Id.*** at ¶¶37-73 (Prosser, J., concurring). Accordingly, this court appreciates that the instant appeal may merit further review.