

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 10, 1995

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(1), STATS.

NOTICE

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

No. 94-0963

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE ASSESSMENT OF
COSTS IN STATE V. CLYDE W. ALLEN:**

ROBERT F. NAGEL,

Appellant,

v.

STATE OF WISCONSIN,

Respondent.

APPEAL from an order of the circuit court for Dane County:
JACK F. AULIK, Judge. *Reversed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Robert Nagel appeals from an order assessing him \$333 in costs in a criminal proceeding. Nagel, an attorney, represented the defendant, Clyde Allen. The court assessed costs against him, pursuant to

§ 973.06(1), STATS., after finding that he violated his discovery obligation under § 971.25(2), STATS. We conclude that Nagel did not violate § 971.25(2), and therefore reverse.

The day before trial the prosecutor stated on the record that she intended to call Freddie Brown as a witness for the prosecution. After Nagel subsequently learned that the prosecution would not call Brown, he announced at a pretrial hearing the next day that he intended to call Brown as a defense witness. The prosecutor immediately demanded that he disclose Brown's criminal record, requested a new trial date, and moved for sanctions because Nagel violated his obligation to provide that information on Brown, and on two other witnesses, at an earlier time. In doing so, the prosecutor falsely denied identifying Brown as a witness less than twenty-four hours earlier. The trial court found that Nagel's failure to disclose Brown's criminal record before the trial date violated the discovery statute, § 971.25(2), STATS. After Allen's subsequent conviction, the court imposed costs against Nagel for that reason.

Section 971.25(2), STATS., requires a defense attorney to disclose any known criminal record of a defense witness upon demand. However, the prosecutor never presented any such demand until the day of trial. Before Nagel became counsel, the prosecutor moved for, but never obtained, an order requiring the disclosure of any defense witnesses' criminal records. That motion, directed to the court, in no way constituted a demand on not yet appointed counsel.

Our decision that no discovery violation occurred makes it unnecessary to determine whether the court has authority to assess costs against a defense attorney under § 973.06(1), STATS., which on its face appears to authorize costs only against the defendant. Nor must we decide whether the penalty was unreasonable or excessive given Nagel's apparently good faith reliance on the prosecutor's representation that she intended to call Brown as a prosecution witness, and his assumption that she would know the record of her own witness.

By the Court. — Order reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.