WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2017

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
Dodge
Fond du Lac
Racine
Waukesha

WEDNESDAY, APRIL 12, 2017

9:45 a.m.	15AP1261-CR	State v. Navdeep S. Brar
10:45 a.m.	15AP450-CR	State v. Adam M. Blackman
1:30 p.m.	15AP791-CR	State v. Ernesto E. Lazo Villamil

WEDNESDAY, APRIL 19, 2017

9:45 a.m.	15AP1294-CR	State v. Lewis O. Floyd, Jr.
10:45 a.m.	15AP2366	Thomas F. Benson v. City of Madison
1:30 p.m.	15AP2052-CR	State v. Kenneth M. Asboth, Jr.

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Wednesday, April 12, 2017

2015AP1261-CR State v. Brar

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge John W. Markson, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Navdeep S. Brar, Defendant-Appellant-PETITIONER

Issues presented: This drunken driving case examines what constitutes actual consent to a blood draw when no search warrant is obtained, and whether the facts here would negate any such consent as constitutionally involuntary. The Supreme Court reviews the issues in light of the U.S. Supreme Court decision in Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552 (2015). The issues, as presented by the defendant Navdeep S. Brar:

- Whether consent justified the warrantless blood draw?
- Whether the state proved consent to be voluntary?

Some background: Brar was convicted of operating while intoxicated (OWI), third offense. Middleton Police Officer Michael Wood had stopped Brar for speeding. During the stop, Wood arrested Brar for OWI. The stop and the arrest are not being challenged by Brar.

After the arrest, Wood transported Brar to the Middleton Police Department, where Wood read the Informing the Accused form to Brar. What happened next is subject to some differing interpretations. As directed at the end of the form, Wood asked Brar whether he would "submit to an evidentiary chemical test of your blood."

At a later suppression hearing, Wood testified that Brar gave a response to the effect of "Of course, [I don't] want to have [my] license revoked." Wood testified that he understood Brar's response to mean that he was consenting to a blood draw. Brar, however, then asked what kind of test would be conducted. Wood responded that it would be a blood test. Brar responded by asking whether a search warrant was required for a blood test. Wood shook his head, indicating that no search warrant was required.

Brar says an audio recording of the conversation contradicts Wood's testimony, and that there is no audible response when Wood asked Brar if he would submit to the test. Brar claims that his continuing to ask the officer questions shows that he never actually consented to the blood draw. Further, Brar says Wood misled him about the need for a search warrant, which caused him to acquiesce in allowing the blood draw and rendered any possible consent involuntary.

Brar's suppression motion was denied. He challenges the circuit court's factual finding that he consented to the blood draw and to the legal conclusion of both the circuit court and the Court of Appeals that his consent was constitutionally valid.

He asks the Wisconsin Supreme Court to determine what constitutes consent to a blood draw, in light of the U.S. Supreme Court's decision in McNeely that the dissipation of alcohol, by itself, is not sufficient to avoid the necessity of a search warrant for a blood draw.

Brar points out that the U.S. Supreme Court has established an objective test for determining the scope of a person's consent to a Fourth Amendment search. Florida v. Jimeno, 500 U.S. 248, 251 (1991). He argues that a reasonable bystander would not have understood his expressions of desire to avoid revocation of his driver's license as an agreement to a bodily invasion, especially when it was part of a back-and-forth that was immediately followed by questions about what type of test would be conducted and whether a warrant was needed before any such test could be performed.

A decision by the Wisconsin Supreme Court is expected to provide police and lower courts guidance on what is required for a suspect to provide consent and for that consent to be knowing and voluntary.

Wisconsin Supreme Court
10:45 a.m.
Wednesday, April 12, 2017

2015AP450-CR State v. Blackman

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Fond du Lac County, Judge Gary R. Sharpe, reversed and remanded
Long caption: State of Wisconsin, Plaintiff-Appellant-RESPONDENT, v. Adam M. Blackman, Defendant-Respondent-PETITIONER

Issues presented: This case arises from a collision between a vehicle and a bicyclist who was seriously injured. The Supreme Court examines Wis. Stat. § 343.305(3)(ar)2, the state's implied consent law, in light of an apparent legislative drafting error, and more specifically here, whether evidence from Adam Blackman's warrantless blood test should have been suppressed.

Some background: Adam M. Blackman made a left-hand turn in front of an oncoming bicyclist, who sustained very serious injuries. A police officer investigated the accident and concluded that Blackman failed to yield to the bicycle. The officer did not suspect and did not have probable cause to believe that Blackman was under the influence of an intoxicant at the time of the accident. Given the serious injuries to the bicyclist, the officer requested a blood sample from Blackman pursuant to Wis. Stat. § 343.305(3)(ar)2.

The officer read Blackman the Informing the Accused form, the language of which is mandated by § 343.305(4). The form includes the warning that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties."

Blackman gave a sample of his blood, which revealed a blood-alcohol concentration (BAC) of 0.10 percent. He was charged with reckless driving causing great bodily harm, injury by intoxicated use of a vehicle, injury by use of a vehicle with a prohibited BAC, operating a motor vehicle while under the influence of an intoxicant (OWI), and operating a motor vehicle with a prohibited BAC.

Blackman moved to suppress the results of the blood test, arguing that his consent to the blood test was coerced. Blackman claimed that his consent was not voluntarily given because there is no revocation procedure in the implied consent law for a driver in his situation – one involved in a serious injury crash who violated a traffic law but who had not shown signs of impairment. In particular, Blackman argued that, for a driver involved in a serious injury crash who violated a traffic law but who had not shown signs of impairment, the issues at a refusal hearing are statutorily limited to: 1) whether the officer had probable cause to believe the driver was under the influence of alcohol/controlled substance; and 2) whether the driver was lawfully placed under arrest for an OWI-related violation. *See* § 343.305(9)(a)5. Blackman argued that, if he had requested a refusal hearing within 10 days, the presiding court could not have concluded that either of these two circumstances existed here. Blackman claimed that it was coercive for police to force him to choose between a blood draw and a threatened license revocation that is legally unsustainable.

The trial court agreed with Blackman's argument and suppressed the blood test result.

The Court of Appeals reversed, finding that the fact that Blackman could have prevailed at a refusal hearing due to the Legislature's failure to amend the refusal hearing statute does not transform Blackman's freely given actual consent under Wisconsin's implied consent law into a coerced submittal.

Blackman continues to argue that it was coercive for police to force him to choose between a blood draw and a threatened license revocation that is legally unsustainable. Blackman also argues that, as a general matter, it is unconstitutional for Wisconsin to penalize motorists who are not suspected of any impaired driving for refusing to take a warrantless blood test. He insists that the recently decided United States Supreme Court case, Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160, 2184–85 (2016), supports his argument.

The state says that it was entirely correct for the officer to inform Blackman that if he refused a request for a blood draw, his operating privilege could be statutorily revoked. The state argues that the disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutory scheme for refusal hearings does not make the implied consent law unconstitutional.

Wisconsin Supreme Court
1:30 p.m.
Wednesday, April 12, 2017

2015AP791-CR State v. Lazo Villamil

Supreme Court case type: Petition for Review/Petition for Cross Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judges Donald J. Hassin, Jr. and Michael J. Aprahamian, affirmed in part; reversed in part and cause remanded with directions
Long caption: State of Wisconsin, plaintiff-respondent-cross petitioner, v. Ernesto E. Lazo Villamil, defendant-appellant-petitioner

Issues presented:
This case examines issues arising from statutory language that appears to make operating after revocation (OAR) and causing death both a misdemeanor and a felony.

Lazo Villamil's Issues:

- Whether it is proper to determine that a single offense can be punished as either a misdemeanor or felony in order to resolve ambiguity in the statutory language when the legislative intent was to create a penalty scheme with increasing punishment for additional elements?
- Whether a statute, unintentionally created by the legislature, which gives discretion to the prosecution where none was intended, [can] be applied constitutionally?

State of Wisconsin's Issues:

- Should Wis. Stat. § 343.44(1)(b) be authoritatively construed as though the word "knowingly" did not appear there, to correct an obvious oversight by the Legislature in failing to delete this word when it revised the statute, to clarify the statutory scheme for punishing drivers who cause a death while operating after revocation of their operator's license, and to fully effectuate the Legislature's actual intent?
- Should Wis. Stat. § 343.44(2)(b) be authoritatively construed to be directory rather than mandatory, so as to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors?

Some background: On Oct. 30, 2012, Ernesto E. Lazo Villamil drove into the rear end of another vehicle, killing the operator of that vehicle. Villamil's driver's license was revoked at the time. The state charged Lazo Villamil with, and Lazo Villamil pled to, one count of violating Wis. Stat. § 343.44(1)(b) and Wis. Stat. § 343.44(2)(ar)4 for causing the death of another person while OAR, a felony. In the course of his plea, he admitted that at the time he operated the vehicle, he knew his license was revoked.

The trial court sentenced Lazo Villamil to the maximum penalty of three years of initial confinement followed by three years of extended supervision. Lazo Villamil filed a post-conviction motion, which the trial court denied following a hearing.

Lazo Villamil appealed.

Lazo Villamil argued that because Wis. Stat. § 343.44(1)(b) (2009-10) and Wis. Stat. § 343.44(2)(ar)4. (Eff. Mar. 1, 2012) provide that either the misdemeanor or the felony provision could apply to his offense, ambiguity exists as to which provision should apply. Based upon the rule of lenity, he says the misdemeanor should apply. The rule of lenity "provides generally that ambiguous penal statutes should be interpreted in favor of the defendant." State v. Cole, 2003 WI 59, ¶67, 262 Wis. 2d 167, 663 N.W.2d 700.

The Court of Appeals noted that the legislature intended to treat an OAR causing death offense as a misdemeanor, if the operator did not know his/her license had been revoked, and as a Class H felony if the operator knew. The legislature, however, failed to remove the "knowledge" element from the misdemeanor language of §§ 343.44(1)(b)/343.44(2)(ar)4., and thus failed to accomplish the first part of this intent. Nonetheless, the Court of Appeals held that in the situation involved here, where Lazo Villamil caused the death of another and knew his license had been revoked, the legislative history shows that the Legislature intended to treat such an offense as a Class H felony.

Lazo Villamil also unsuccessfully argued at the Court of Appeals, and maintains before the Supreme Court, that the prosecutor's decision to charge the felony penalty violated due process and equal protection principles.

The state agrees with the Court of Appeals about legislative intent, and says there was an obvious drafting oversight that may be corrected through the doctrine of "implied repeal." On another issue, the Court of Appeals remanded for new sentencing, agreeing with Lazo Villamil that he is entitled to resentencing because the record failed to show that the circuit court considered sentencing factors required by Wis. Stat. § 343.44(2)(b). The parties dispute the meaning of the word "shall" as used in the statute.

Wisconsin Supreme Court
9:45 a.m.
Wednesday, April 19, 2017

2015AP1294-CR State v. Floyd

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Allan B. Torhorst, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Lewis O. Floyd, Jr., defendant-appellant-petitioner

Issues presented:

- Whether an officer's justification to search is objectively reasonable where the suspect is not observed doing or saying anything suspicious, but cooperating in circumstances that the officer believes are suspicious?
- Whether counsel rendered ineffective assistance by failing to present additional evidence to show Floyd did not provide valid consent?

Some background: Around 6:45 p.m. on July 23, 2013, a Racine County deputy stopped Lewis O. Floyd's vehicle because the registration was suspended. During the deputy's two- or three-minute initial contact, Floyd said he had neither a driver's license nor insurance. Floyd did provide his Wisconsin identification card, from which the deputy determined Floyd's address was in Kenosha.

The deputy suspected there might be some criminal activity going on in the vehicle because usually a large number of air fresheners as seen in Floyd's vehicle are used to mask the smell of narcotics. The deputy knew the area of the stop was a high crime area with large quantities of drug and gang activity. The deputy also suspected possible criminal activity because of the time of day, the fact that the windows of Floyd's vehicle were tinted, and Floyd was alone in the vehicle.

After observing the air fresheners, the deputy went back to his squad car and prepared three citations related to the suspended registration, lack of insurance, and lack of a driver's license. The deputy contacted dispatch to ask for a canine unit or a "cover" squad. No canine unit was available, but a city of Racine police officer was sent to the scene.

After five or six minutes, the deputy re-initiated contact with Floyd. The deputy asked Floyd to exit the vehicle, which Floyd did, so the deputy could explain the citations to him. The deputy said at the hearing on the suppression motion that Floyd was not free to leave at that point because the deputy still had to explain the citations to him and return his identification.

As Floyd exited the vehicle, the deputy asked if had "any weapons or anything on him that could hurt" the deputy. Floyd said he did not. The deputy "asked him then if I could search him for my safety and he said yes, go ahead." During the search, the deputy located illegal drugs that led to charges of two counts of possession with intent to deliver a controlled substance, second or subsequent offense, and two counts of bail jumping.

At the hearing on the suppression motion, the circuit court found the deputy had reasonable suspicion to extend the traffic stop beyond just addressing the citations due to the air

fresheners, as well as "the tinted windows, the time of the day, that Mr. Floyd was alone in his vehicle, [and] he's from Kenosha."

The circuit court also found that the deputy had asked Floyd to get out of the vehicle and consented to a search of his person. Accordingly, the circuit court denied the suppression motion.

Floyd pled no contest to one count of possession with intent to deliver a controlled substance and the second count of possession with intent to deliver as well as the two counts of bail jumping were dismissed and read in. Floyd was sentenced to three years of initial confinement and three years of extended supervision. The sentence was stayed in favor of three years of probation.

Floyd filed a post-conviction motion claiming that his trial counsel was deficient in failing to call as a witness at the suppression hearing the City of Racine police officer who arrived at the scene to provide "cover" for the deputy.

Floyd argued that officer would have testified that the deputy did not ask Floyd if he could search him but rather told him he was going to do so. The circuit court denied the motion. Floyd appealed. The Court of Appeals affirmed.

The Court of Appeals said the question of reasonable suspicion was a very close call in this case, but based on the totality of the circumstances it concluded the deputy's suspicion that there might be some sort of criminal activity going on in the vehicle was reasonable and warranted a brief extension of the traffic so the deputy could conduct further investigation.

The Court of Appeals also upheld the circuit court's denial of Floyd's post-conviction motion which argued that trial counsel was ineffective in failing to present evidence at the suppression hearing that the deputy did not in fact ask Floyd if he could be patted down but rather told Floyd he was going to do a pat down. Floyd asserted that if counsel had called as a witness at the suppression hearing the Racine police officer who came to provide "cover" for the deputy, Floyd's consent to the search would not have been found voluntary.

Wisconsin Supreme Court
10:45 a.m.
Wednesday, April 19, 2017

2015AP2366 Benson v. City of Madison

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Richard G. Niess, affirmed
Long caption: Thomas F. Benson, Mark Rechlicz, Mark Rechlicz Enterprises, Inc., Robert J. Muranyi, RJM Pro Golf Incorporation and William J. Scheer, plaintiffs-appellants-petitioners, v. City of Madison, defendant-respondent

Issues presented:
This case examines the Wisconsin Fair Dealership Law, and whether golf pros working at city golf courses under an agreement had a "dealership" within the meaning of the law.

- Is a Wisconsin municipality or other governmental unit engaging in revenue-generating activities in competition with private sector businesses a "person" required to abide by the same rules under the Wisconsin Fair Dealership Law that private businesses are obligated to follow?
- Did the City of Madison, through the operation of its city-owned golf courses, sell any goods or services to the public, satisfying the goods and services element of the Wisconsin Fair Dealership Law as the golf pros were independently contracted to sell those goods and services for the city?
- Did the golf pros' contractual obligations to contribute thousands of dollars annually to a joint advertising fund with the city, for purposes of marketing the city golf courses utilizing the city brand, "Golf Madison Parks," satisfy the Wisconsin Fair Dealership Law requirement for selling goods or services using a "trade name, trademark, service mark, logotype, advertising or other commercial symbol"?

Some background: The City of Madison owns four golf courses which it makes available to the public as part of its parks department. The city had an arrangement with a golf pro for each course, governed by a written operating agreement. As part of the parties' arrangement under the operating agreements, the city maintained the grounds of the golf courses. The golf pros performed most other golf course operations including controlling the use of the golf courses; providing golfing equipment for rental; operating food and beverage concessions; providing lessons to golf course patrons; and operating pro shops selling golf-related products. The golf pros employed staff to assist in carrying out these contractual obligations.

The city decided not to renew its contracts with the golf pros and instead started using city personnel to run all golf course operations. The golf pros sued the city, arguing that it had violated the fair dealership law by not renewing or terminating their contracts without good cause or adequate written notice. They sought money damages caused by the city's alleged fair dealership law violations.

The golf pros moved for partial summary judgment on liability, and the city moved for full summary judgment. Following briefing and oral argument, the circuit court denied the golf pros' motion for partial summary judgment on liability and granted the city's motion for

summary judgment, dismissing the golf pros' amended complaint. The circuit court found that the golf pros' contractual relationships with the city were not protected "dealerships" under the Wisconsin Fair Dealership Law.

The Court of Appeals agreed, finding also that the golf pros did not have dealerships because their arrangement with the city did not give them the right to sell or distribute city goods or services or the right to use a city trade name, trademark, service mark, logotype, advertising, or other commercial symbol – one element that is necessary to be considered a dealership under a previous Wisconsin Supreme Court decision.

The Court of Appeals affirmed the circuit court's entry of summary judgment dismissing the golf pros' fair dealership law claims against the city.

The golf pros also continue to argue that the lower courts incorrectly found that they failed to satisfy either the "goods or services" or the "right to use logo, advertising, or commercial symbols" portions of the fair dealership law.

The City of Madison says both lower courts followed the statutory definition of a "dealership" previously explicated by this court and concluded the golf pros did not have "dealerships" with the city.

A decision by the Supreme Court is expected to develop and harmonize the law with respect to various issues concerning service dealerships.

Wisconsin Supreme Court
1:30 p.m.
Wednesday, April 19, 2017

2015AP2052-CR State v. Asboth

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dodge County, Judge John R. Storck, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Kenneth M. Asboth, Jr., defendant-appellant-petitioner

Issues presented:

- Must a community-caretaker impoundment of a vehicle be governed by "standard criteria" limiting the discretion of law enforcement officers and, if so, was the impoundment here made in accord with such criteria?
- Was the impoundment here a valid community caretaker action where the vehicle was parked at a private storage facility?
- Relatedly, does the Constitution require the state to show that a community caretaker impoundment and search is not a pretext concealing criminal investigatory motives?

The Supreme Court reviews this case in light of other state and federal court cases, as well as law enforcement department policy differences between Dodge County and the city of Beaver Dam.

Some background: Kenneth M. Asboth, Jr. was suspected of robbing a bank in Beaver Dam with what appeared to be a handgun. About a month after the robbery, the Fox Lake police received a tip that Asboth was at a storage facility. The first officer to arrive saw a man, who turned out to be Asboth, standing outside of a car parked in the lane between rows of storage units and reaching into the back seat. The officer took Asboth into custody for a violation of a probation warrant, as well as suspicion that he had committed the robbery. It turned out that the car was registered to an owner in Madison. Police decided to remove the vehicle.

The car was towed to the Beaver Dam police station where officers searched it, and a pellet gun, appearing similar to that used in the robbery, was found in the spare tire compartment. The officers testified that they considered the search to be a routine inventory search.

Pretrial, Asboth moved to suppress the gun on the ground that the search of the vehicle was not a valid inventory and violated the Fourth Amendment. The court denied the suppression motion. Following an unsuccessful motion for reconsideration, Asboth pled no contest to armed robbery. He attempted, unsuccessfully, to withdraw this plea, and to pursue an interlocutory appeal of the denial of withdrawal. The court sentenced him to 20 years of imprisonment, with 10 years of initial confinement and 10 years of extended supervision. Asboth appealed and the Court of Appeals affirmed. State v. Asboth, No. 2015AP2052-CR, 2016 WL 5416012 (Wis. Ct. App. Sept. 29, 2016).

The Court of Appeals' decision discusses the community caretaker requirement, noting that there is disagreement among the circuits as to the proper test for a vehicle impoundment. Some jurisdictions hold that law enforcement officers may only constitutionally impound

vehicles pursuant to "standardized departmental criteria" while others deny that this is a requirement. However, the Court of Appeals declined to decide whether this is the law of Wisconsin, concluding that even if such a policy is necessary, the sheriff's department policy in this case was sufficient. It further held that the seizure of Asboth's vehicle was a valid community caretaker activity.

Police do not violate the Fourth Amendment if they seize a vehicle pursuant to the community caretaker doctrine, that is, if the seizure is consistent with the role of police as "caretakers" of the streets. *See* South Dakota v. Opperman, 428 U.S. 364, 370 (1976); State v. Clark, 2003 WI App 121, ¶20, 265 Wis. 2d 557, 666 N.W.2d 112.

The relevant policies at play belong to the Beaver Dam Police Department (who took Asboth's car into custody) and that of the Dodge County Sheriff's Department (who had jurisdiction over the location where Asboth was arrested).

The county's policy, which the Court of Appeals ruled relevant, authorized deputies to seize vehicles in various scenarios, including when: (1) the driver of a vehicle is taken into police custody; and (2) as a result, that vehicle would be left unattended.

Asboth argues that the city's policy was applicable here. He says that neither the county's policy nor the city's policy contained standardized criteria that provided sufficient guidance to justify seizure under the community caretaker doctrine.

The parties agree that police seized the car here within the meaning of the Fourth Amendment. However, Asboth suggests that the seizure was not a valid exercise of community caretaker activity because the police actually had a motive to search the car (for evidence related to the robbery) implying that their invocation of the community caretaker excuse was a pretense.

The Court of Appeals concluded that "an otherwise valid seizure of a vehicle under the justification of the community caretaker doctrine is not rendered invalid by the fact that police appear to have an investigatory motive – even a strong investigatory motive – in seizing the vehicle."

The Supreme Court is expected to decide whether an impoundment and inventory are unconstitutional where they serve as a pretext for criminal investigation.