2019 SPD Conference
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Supreme Court Update
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STATE V. MITCHELL
Decided by the United States Supreme Court- 6/27/19

INTRODUCTION:
In this Wisconsin case, the United States Supreme Court examined a warrantless blood search of an unconscious driver arrested for O.W.I. Ultimately, the Court did not determine whether the warrantless blood draw was lawful, but rather remanded the case back to the trial court to see if the test evidence was admissible under the exigent circumstance exception to the warrant requirement. In formulating its exigent circumstance rule for warrantless blood draws of arrested unconscious drivers, the Court opined that a warrant would only very rarely be necessary and the onus would be on the defendant to show either that his blood would not have been drawn if the police had not been seeking BAC information, and that the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. In effect, the Court created an almost, but not quite, bright line rule allowing for warrantless blood draws of unconscious drivers arrested for O.W.I.

FACTS
The police received information that Mitchell, appearing to be very drunk, had climbed into a van and driven off. The police soon found Mitchell wandering near a lake, and Mitchell was clearly quite intoxicated. Mitchell was arrested for O.W.I. In route to the police station Mitchell's condition deteriorated and as a result he was driven to the hospital for a blood test. During transport Mitchell became unconscious and at the hospital a warrantless blood draw for BAC evidence was administered to an unconscious Mitchell. The sample was taken and an analysis of his blood showed that his BAC, about 90 minutes after the arrest, was 0.222%.

PROCEDURAL HISTORY
At trial court, Mitchell moved to suppress his blood test results arguing that the warrantless blood draw violated his Fourth Amendment rights. The State responded by arguing that the blood draw was permissible under the statutory provision of our Implied Consent law stating that unconscious drivers are deemed to have consented to the test. The trial court denied Mitchell's suppression motion and a jury found Mitchell guilty of drunk driving. Mitchell appealed to the court of appeals, and that court certified the matter to the Wisconsin Supreme Court.
In a plurality opinion the Wisconsin Supreme Court affirmed Mitchell's conviction. While 5 justices agreed that the warrantless blood draw did not violate the Fourth Amendment, they employed different rationales. Three justices found the draw permissible under the

Implied Consent Statute, while two others found the draw permissible on general Fourth Amendment reasonableness grounds.
Mitchell then appealed to the United States Supreme Court who granted review. The case was heard on oral argument on April 23, 2019.

THE SUPREME COURT HOLDING
Though the State reprised its argument that Mitchell's blood draw was permissible under our Implied Consent law, and Mitchell continued his insistence that the portion of the statute relating to unconscious drivers was unconstitutional, the high Court's plurality opinion did not consider the statute in its analysis. Instead, the Court crafted a rule for interpreting the validity of warrantless blood draws for unconscious people arrested for OWI. The rule is that in almost all cases, a warrantless blood draw of the unconscious person will be permissible under the exigent circumstance exception to the warrant requirement. After articulating its rule, the Court vacated the judgement of conviction and remanded to provide Mitchell with the opportunity to show that there was no exigency in his case.

KEY POINTS
It is technically a Plurality Opinion, but not really.
While only four justices signed off on the rule that almost always a warrantless blood draw of an unconscious driver will be permissible under exigent circumstances, a fifth justice felt the rule did not go quite far enough. The fifth, Justice Thomas, felt that "almost always" should be changed to "always". So a majority of the justices agree, at the very least, that warrantless blood draws in the unconscious driver context, should be looked upon with great favor.

Burden is on the defendant to show a lack of exigency.
Adding further bite to its rule, the Court held that in the event of a warrantless blood draw of an unconscious arrested driver the burden will be on the defendant to show a lack of exigency. Specifically, a defendant will have to show that his blood would not have been drawn if police had not been seeking BAC information, and that the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Where does the opinion leave the portion of our statute dealing with the unconscious driver?
While no court to date has found the unconscious driver provision of our Implied Consent statute unconstitutional. no court has adopted it as a justification for the blood draw. But, under *Mitchell,* this lack of clarity is of little practical import as the blood can almost always be drawn properly without a warrant under exigent circumstances. So, there is no need for the State to rely on the statute for admission of the blood evidence.

Impact on the rest of our Implied Consent statute.
This case has no impact on the rest of the statute. Indeed, the case nods approvingly as to the reasons for Implied Consent laws in all 50 states, and there is nothing in the opinion challenging their validity or applicability to the conscious OWI arrested driver.

Impact on the exigent circumstance doctrine in other type cases
This opinion seems to be a narrow one specifically tailored to the OWI context as it heavily references the dangers of drunk driving and its great negative impact on society. Therefore, it would seem the *Mitchell* rule is only applicable to the unconscious driver arrested for OWI situations and should not be automatically applied to other Fourth Amendment searches.

THE BOTTOM LINE
In the unconscious driver arrested for drunken driving context, warrantless blood draws should be looked upon with great favor. In the crash scenario where the defendant is to be taken to the hospital for treatment, it is a bright line rule for exigency. In the non-crash scenario, where the defendant is not to be taken for treatment, it is a near bright line rule, to be avoided only if the defendant can show that his blood was not going to be drawn anyway for medical concerns, **and,** the police cannot show that application for a warrant would interfere with their pressing needs or duties. The prudent course would be to not admit the blood under the unconscious provision of the statute, but rather to engage in a *Mitchell* exigent circumstance analysis.

***State v. Frederick S. Smith*, 2018 WI 2**
Decided by the Wisconsin Supreme Court - January 2018

Issue:
The court looked at what the police can do when they make a lawful stop, but the reasonable suspicion dissipates before they make contact with the driver. The court opined that, pursuant to the lawful stop, the police are entitled to the basic actions taken during any routine traffic stop; such as asking for the driver's license and checking out the driving record.

Facts:
The police observed a vehicle in a high crime area and ran its plates. This check revealed that the registered owner, Amber Smith, had a suspended license. The police could not ascertain the gender of the driver but effected the stop. This stop is legal under *State v. Newer,* which held that it is reasonable for the police to presume that the registered owner of the vehicle is the driver.

After making the stop the police approached the car but before making contact with the driver, noticed that the driver was not Amber Smith, but a man. Nevertheless, the police continued and asked for the man's driver's license. The police also asked the defendant to roll down his window, but he claimed that he could not do so. The police then asked the defendant to get out of the car and the defendant claimed that his doors were stuck. The

police officer then went to the passenger side and opened the door. Once the door was opened, the police smelled the strong odor of alcohol and eventually the defendant was arrested for OWI- seventh offense.

The Defendant's Argument:
The defendant argued that the police made an unlawful contact, because the reasonable suspicion for the stop had dissipated before contact was made with the driver. The defendant further argued that the police made an unlawful search when they opened the passenger door.

The Court's Holding:
The Wisconsin Supreme Court held that the police, if they make a lawful stop, are entitled to make contact with the driver, even if the reasonable suspicion that prompted the stop had dissipated. And the court held that part of the contact includes asking for the driver's driving license and running a check. Moreover, the court opined that since the police have the right to a face to face dealing with the driver and can command the driver to exit the vehicle, it follows that they can open the door if the driver can't or won't do so. Thus, the court held that the police discovery of the defendant's intoxicated state was lawfully obtained.

Key Points:
1) The police are entitled to a face to face contact with anyone they lawfully stop. The police are similarly entitled to ask for the driver's license and to check it out.
2) This entitlement is not compromised by the fact that the original reasonable suspicion had dissipated before the contact.
3) The police can open the door to make the face to face contact but should not do so unless after being asked to exit the vehicle or to roll down the window, the defendant refuses to do so or claims to be unable to comply with the command.

STATE V. JOHN PATRICK WRIGHT, 2019 WI 45
Decided by the Wisconsin Supreme Court- April 30, 2019

Issue:
If an officer doesn't have reasonable suspicion of criminal activity, may s/he, during a lawful traffic stop, extend the stop to ask the driver whether there are weapons in the vehicle and whether the driver has a valid CCW permit, and may the officer take the time to conduct a CCW permit check?

Facts:
Wright's vehicle was stopped by the police for having only one headlight. The officer who approached Wright asked for his license, whether he was a CCW permit holder, and whether there were any weapons in the car. Wright stated that he had just finished the CCW permit class, and that there was a firearm in the car's glove compartment. The officer confiscated the firearm, then returned to his squad where he checked Wright's license and

ran a CCW permit check. Upon learning that Wright did not possess a valid CCW permit, the officer then arrested him for lawfully carrying a concealed weapon.

The Defendant's Argument:
Based on *Rodriquez v. U.S.*, 135 S.Ct. 1609 (2015), the officer's asking about weapons and a CCW permit, without reasonable suspicion, unlawfully extended the stop, in violation of the Fourth Amendment.

The State's Argument:
State v. Floyd, 2017 WI 78, which was decided by the Wisconsin Supreme Court while this case was pending at the court of appeals, makes clear that a police officer can ask about weapons during a traffic stop without violating the Fourth Amendment.

The Court's Ruling:
In a unanimous opinion the Wisconsin Supreme Court determined that it is not a violation of a stopped driver's Fourth Amendment rights for an officer to ask whether there are weapons in the vehicle, because that is part of the "traffic stop mission". And, after learning that there was indeed a concealed weapon in the vehicle, it was perfectly reasonable for the officer to ask whether the driver possessed a valid CCW permit, and to perform a CCW permit check.

Officer safety is an important part of any traffic stop. The traffic stop mission includes: 1) addressing the traffic violation that warranted the stop; 2) conducting ordinary inquiries incident to the stop; and 3) taking negligibly burdensome precautions to ensure officer safety.

Key Point:
This case underscores the fact that our Supreme Court is fully behind the traffic stop mission and the importance of officer safety in every traffic stop.

STATE v Jessica Randall
Decided by the Wisconsin Supreme Court July 2, 2019

Issue:
Whether a person arrested for OWI who consents to a blood test can rescind that consent after the blood has been drawn but before it has been tested? Both the trial court and the court of appeals held that the defendant could rescind the consent. But, the Wisconsin Supreme reversed holding that once the blood was lawfully drawn after Randall consented to the test; Randall could no longer effectively rescind that consent prior to the blood being tested.

Facts:
Randall was arrested for OWI and was read the Informing the Accused Form. Randall consented to a blood test and an hour later a medical professional withdrew a sample of her blood.
Two days later, and before the blood was tested, Randall, through her attorney, sent a letter to the Wisconsin State Laboratory of Hygiene revoking her previous consent and demanding that the blood not be tested. Notwithstanding Randall's letter, the lab proceeded to test the specimen, which revealed a blood alcohol level of .210.

Procedural History:
Randall was charged with 3rd offense OWI and PAC. Randall moved to suppress her blood arguing that she had rescinded her consent before the blood was tested. The circuit court granted her motion, concluding that Randall's revocation of consent left the state with no sufficient lawful basis for testing the blood. The State appealed the circuit court's decision to the court of appeals.
The court of appeals affirmed the circuit court holding that there was one continuous search; the seizure of the blood and its testing, and thus Randall could rescind her consent because the search had not yet been completed. The State then appealed to Wisconsin Supreme Court who granted review.

The Defendant's Argument:
Randall repeated her argument that had been persuasive below; that she rescinded her consent before the blood was tested, and thus the State needed a warrant to justify the blood analysis. She reasoned that there were actually two searches; the first, the blood draw, was permissible because she consented, but the second, the testing, was unlawful because she had withdrawn her consent and the State had no warrant.

The State's Argument:
The State argued that there was only one search, the seizure of the blood. Since the blood was lawfully seized it could be tested, as that was the only purpose for the draw, to test the blood.

The Court's Holding:
Five of the Justices disagreed with both the circuit court and the court of appeals and held that the blood test was proper and the evidence it generated admissible. The lead opinion (two justices) rejected Randall's two test approach and opined that the search is completed upon the drawing of the blood. Therefore, there was no need to get a second consent to have the blood tested. The lead opinion reasoned that any privacy issues that might remain in the seized blood were forfeited under Fourth Amendment search incident to arrest principles. The lead opinion also emphasized that the two test model Randall urged runs afoul with *Schmerber;* a seminal blood draw case permitting a blood seizure under exigent circumstances. *Schmerber* allows for the warrantless draw under certain exigent circumstances and does not require a search warrant to have the seized blood tested. Three concurring justices agreed that Randall's position was wrong but for more basic reasons. These justices argued that once a person arrested for OWI consents to a blood draw and the blood is taken they have no expectation of privacy in the lawfully seized blood. So, with

no expectation of privacy, there is no Fourth Amendment issue, and the blood can be tested without regard to any protestations Randall might make.

Key Point:
Once blood is lawfully drawn from an arrested person, it can be tested without a warrant or consent for the purpose to obtain evidence supporting the arrest.

***State v. Radder*, 2018 WI APP 36**
Decided by the Wisconsin Court of Appeals - May 2018

Issue:
Whether the trial court properly denied a defendant's suppression motion without a hearing. In an opinion recommended for publication the court of appeals held that the trial court's action was proper because the defendant's motion failed to even remotely show why he would he would have a chance to prevail at a hearing.

Facts:
Radder was pulled over because of expired registration. The officer noticed a strong smell of alcohol in the car and a case of beer as well as two open bottles in the vehicle. The officer also learned that Radder had previously been arrested for OWI. Radder then failed his field sobriety tests. Radder admitted to drinking two Jack and cokes and one "mystery shot." A PBT was performed with a reading of .082. Radder was arrested for OWI.

The Defendant's Argument:
Radder filed a motion to suppress evidence because the officer did not have reasonable suspicion for the stop and no probable cause for the arrest. Radder argued that these were valid arguments worthy of a hearing because both the stop and the arrest were without a warrant and thus presumptively unlawful.

The State's Argument:
The state argued that both motions did not deserve a hearing because the claims were generic and without any alleged factual basis. And the State pointed out that warrantless stops and arrests are the norm in vehicular contact cases.

The Court's Ruling:
The court of appeals reaffirmed that a defendant is not entitled to an evidentiary hearing every time he or she makes a pretrial motion. A hearing is necessary only if a party raises a significant, disputed factual issue. The court of appeals further held that the *Velez* test for motions is applicable in 4th amendment suppression motions. *State v. Velez,* 224 Wis. 2d 1, 589 N.W.2d 9 (1999) The moving party must allege some facts, which if true, would entitle the defendant to relief, but if the defendant fails to raise a question of fact or presents only conclusory allegations, then the circuit court has the discretion to deny the motion without a hearing. The court did acknowledge that in the pretrial context it can be difficult to develop the necessary facts, but the motion must at least show that there is a reasonable probability that the defendant will establish a factual basis for his claim at a

hearing. The court held that Radder could not do that, and thus the trial court properly denied his motion without a hearing.

Bottom Line:
When confronted with boilerplate motions replete with conclusory allegations and no real factual dispute, or the potential for one, encourage prosecutors to seek a denial of the motion without a hearing.

***Carpenter v. United States*, 138 S.Ct. 2206**
Decided by the United States Supreme Court
June 22, 2018

Issue:
Whether looking at historical cell site location information (CSLI) is a search that requires a search warrant. The high court, in a 5-4 opinion, ruled that it is a search under the 4th amendment requiring a search warrant.

Facts:
Carpenter was investigated for his role in several robberies. The government obtained 18 U.S.C. §2703(d) orders directing Carpenter's wireless carriers to turn over 152 days of CSLI records. The records that were turned over provided investigators with an average of 101 data points per day showing the location of Carpenter's phone. These records were then used to establish the presence of Carpenter's phone (and by extension Carpenter himself) in the vicinity of several of the robberies.

The 18 U.S.C. §2703 orders obtained by the government only require reasonable suspicion and therefore are easier to get than a search warrant.

The Defendant's Argument:
The defendant argued that he had an expectation of privacy in his location information collected by the government, requiring a search warrant and thus probable cause.

The State's Argument:
The State argued that there is no expectation of privacy in location information that is shared with a defendant's wireless carriers.

The Court's Ruling:
The US Supreme Court agreed with the defendant and suppressed the location information. The court reasoned that the collection of CSLI information over such a sustained period of time provided the government with detailed encyclopedic information as to his whereabouts, the type of information that would be almost impossible to obtain using traditional surveillance methods. For such information gathering, a 2703 court order obtained with just reasonable suspicion is insufficient. Therefore, this information requires a probable cause search warrant.

Key Point:
This case is not particularly impactful for Wisconsin as our state statutes already require a search warrant for the information obtained here. See Wis. Stats § 968.375(3)

Other Key Points:
This case is to be construed narrowly and not to be viewed as abandonment of the Third-party Doctrine- the doctrine that in most cases finds no expectation of privacy in information shared with third parties. It was the bulky nature of the information sought which led the court to its suppression ruling here. The case does show an increasing high court concern over the investigatory powers associated with high tech equipment.

***State v. Pinder*, 2018 WI 106**
Decided by the Wisconsin Supreme Court
November 16, 2018

Issue:
This case deals with whether the state statute governing search warrants is applicable for a GPS warrant. The court held that a GPS warrant is not controlled by the warrant statute although it must adhere to basic Fourth Amendment principles.

Facts:
The police received a confidential tip that Pinder had been burglarizing hospitals and businesses. Pinder was also suspected of being involved in several other burglaries. The police applied for and received a warrant to place and monitor a GPS tracking device on Pinder's vehicle. They installed the device ten days after the warrant was issued.

The device alerted the police that Pinder was in a business office complex, and the responding police discovered that the building had been burglarized. The police stopped Pinder's vehicle in the highway and found gloves, screwdrivers, and other items that were stolen from the burglary site.

The Defendant's Argument:
Pinder argued that the GPS warrant was invalid because the police waited ten days after it was issued before execution. As the search warrant statute requires warrant's to be executed within 5 days, Pinder argued that the extra five-day delay rendered the warrant invalid.

The State's Argument:
The state argued that the search warrant statute was inapplicable because the police were not looking for property but rather for the right to collect data.

The Court's Opinion:
The Wisconsin Supreme Court agreed with the State and held that the search warrant statute did not control the issue. The court reasoned that the five-day time limit was not applicable since the data generated by the GPS device was not even in existence at the time

the GPS was installed. So, the police were not searching for the type of property contemplated in the search warrant statutory language. Therefore, our state's high court opined the GPS warrant need not comply with the search warrant statute. But the GPS warrant did have to comply with basic Fourth Amendment principles.

The Court felt that the warrant contained sufficient probable cause, was signed by a neutral, detached magistrate, and was executed in a reasonable manner. Thus, it complied with the Fourth Amendment and the evidence generated by the GPS tracking should not be suppressed.

Key point:
It should be remembered that routine search warrants authorizing the search for property are covered by the statute and thus must be executed within five days of issuance. If these search warrants, looking for property, books, papers, records, recordings, tapes, photographs, films or computer or electronic data, are not executed within the statutory time period the evidence the warrant produces will
suppressed. But a warrant authorizing the collection of data not yet produced is not governed by the search warrant statute

***United States v. Clark,* 2019 WL 3821808**
Decided by the US Court of Appeals (7th Circuit) 8/15/2019

Issue:
Whether omitting negative information about a confidential informant in a search warrant application is enough to get a *Franks* hearing to determine whether law enforcement deliberately or recklessly presented false material information or omitted material information from the affidavit provided to the issuing judge.

Facts:
A law enforcement officer prepared a search warrant application and signed the supporting affidavit. The officer said that a confidential informant contacted him on October 14, 2015 and told him that earlier that day, he had driven someone to a parking lot adjacent to the Baywalk Inn in Superior to buy heroin from a black male called "Big Mike," the brother of "Toonchie." The officer said that he and another officer then performed their own investigation, including surveillance of the parking lot of the motel. The officer observed a black male leave the hotel and enter and then exit at least five cars in the hotel parking lot. He also learned that the guest staying in Room 203 was the only hotel guest who both had paid in cash and was staying only one night, all behavior that the officer said was typical of drug trafficking, based on his training and experience. The officer also said he had spoken to a woman (referred to in this case as the "mom on a mission") who said that her daughter was a heroin addict and that she (the mother) had followed a man she suspected of drug dealing to Room 203.

The officer included all of the above information in his search warrant affidavit, which resulted in a judge issuing a search warrant for Room 203. The officer did not include any

damaging information about the credibility of his confidential informant, who was the only source of information specifically about drug trafficking. The informant was being paid for his services. He also had two pending criminal charges against him, fifteen prior convictions, and a history of opiate and cocaine abuse, and he was hoping to receive a reduced sentence in exchange for his cooperation.

Law enforcement executed the search warrant on Room 203 and located the defendant with more than 80 grams of a heroin/fentanyl mixture, a scale, and cellophane bags. The defendant was convicted after a jury trial and appealed the court's denial of his *Franks* motion without a hearing.

The Defendant's Argument:
The defendant argued that he presented enough evidence to show that the officer omitted material information from the search warrant affidavit and that the court did not consider all evidence relevant to probable cause.

The Government's Argument:
The government argued that the defendant was not entitled to a *Franks* hearing because the confidential informant's information was corroborated by law enforcement, such that the informant's credibility was not material.

The 7th Circuit Holding:
The Court agreed with the defendant and remanded the case to the district court for an evidentiary hearing. The Court did not make any findings about the ultimate merits of the motion, but found that the defendant had made a substantial preliminary showing: (1) that the warrant application contained a material falsity or omission that would alter the issuing judge's probable cause determination, and (2) that the affiant included the material falsity or omitted information intentionally or with a reckless disregard for the truth. The material omission was the failure to include any damaging information about the confidential informant's credibility. The Court held that the informant's tip was not sufficiently corroborated by law enforcement to make the informant's credibility immaterial.

On the second prong, the Court found that the officer affiant's omission of "so much important information," could permit the inference that the omissions were deliberate or reckless. Because the corroboration came from the same officer who omitted the credibility information, the Court held that the officer's credibility could be "legitimately questioned." Again, the Court did not find that the officer *was* deliberately or recklessly deceptive, only that the defendant had made a sufficient showing to get an evidentiary hearing.

Strong words in the partial dissent:
While this was a federal case, the dissent had strong words for Wisconsin:
"A final observation seems worthwhile. When this case entered federal court, a magistrate judge reviewed the state court warrant application and noted that it, like many others prepared by law enforcement officers in Wisconsin, omitted information about the confidential informant's criminal history. The panel's opinion, aligned with our precedent,

reinforces that this information is essential to a proper probable cause analysis under the Fourth Amendment…

Given the frequency with which search warrants sought and executed at the state level result in federal prosecutions, Wisconsin law enforcement would do well to revisit its warrant application practices. Omitting information about an informant's credibility creates real yet avoidable peril. Today's decision proves the point."

STATE V. Tyrus Lee Cooper
Decided by the Wisconsin Supreme Court- 06/20/19

INTRODUCTION

In this case, the Wisconsin Supreme Court examined the trial court's denial of Cooper's motion to withdraw his pre-sentencing plea. Ultimately, the Supreme Court affirmed the court of appeals affirmance of the trial court holding.
In a 4-2 opinion the Court found that since Cooper did not demonstrate that his trial counsel was ineffective, and since he was using ineffective counsel as the justification for his pre-sentencing plea withdrawal, the trial court did not erroneously use its discretion in denying Cooper's motion to withdraw his plea. While the facts that spawned this case were somewhat unusual and likely not to be often replicated, a basic legal tenant emerged from this case; proof that an attorney violated a Supreme Court rule of professional conduct is not necessarily proof that the attorney provided ineffective counsel.

FACTS

Cooper was charged with a single count of armed robbery as a party to a crime. Mr. Hicks was assigned to represent Cooper after the withdrawal of his original counsel. Two weeks before the scheduled trial Cooper wrote to the trial court complaining that Mr. Hicks had not provided him with a copy of the discovery materials and had failed to subpoena key witnesses. Cooper further advised in his letter that he had not spoken to Mr. Hicks, by phone or in person, and therefore he could not prepare for trial.

Shortly before trial, Cooper reached a plea agreement whereby the State agreed that if Cooper pled guilty to the charge the State would recommend a sentence of three years of initial confinement and three years of extended supervision. Cooper entered his plea and during the hearing he was specifically asked about the letter he had sent and the complaints he had raised. Cooper told the trial court to take no actions with respect to the letter and indicated that he wanted the letter disposed of. Cooper reassured the trial court that he fully understood his plea and was confident in entering it.

After the plea hearing, and three weeks before sentencing, Cooper sent a new letter to the trial court asking to withdraw his plea due to the ineffective assistance of counsel. Cooper explained that Mr. Hicks had not told him that he had been suspended from practicing law during part of his representation, and that Hicks had misled him into accepting the plea by warning that Cooper was destined to lose at trial. The trial court allowed Hicks to withdraw as counsel and rescheduled the sentencing hearing. Cooper's new counsel moved to withdraw Cooper's plea repeating many of the concerns Cooper had listed in his original

letter, which he had asked the court to ignore when entering his plea. The motion added to the original letter's complaints the fact that Hick's law license had been suspended.

At the plea-withdrawal motion hearing, Cooper's new lawyer said that Cooper would have asked for a new attorney if he knew Hicks had been suspended, and that he entered his plea in haste because he believed he was not ready for trial. But Cooper's new counsel also indicated that if plea withdrawal motion was granted, Cooper might enter the same plea because he was satisfied with the State's recommendation. The trial court denied the motion reasoning that all the complaints in the original letter had been properly addressed and disposed of at the plea hearing. The trial court also concluded that granting Cooper's plea withdrawal motion would cause substantial prejudice to the State.
Cooper appealed.

Two years after Cooper had moved to withdraw his plea, and while his appeal was pending, the Wisconsin Supreme Court ruled that Hicks had violated Supreme Court rules of Professional Conduct. Some of the violations came from Hick's representation of Cooper.

The court of appeals affirmed the trial court and Cooper appealed to the Wisconsin Supreme Court. The Court granted review and the case was argued on April 15, 2019.

PROCEDURAL HISTORY

Because of the nature of this case, the pertinent facts section also provides the procedural history.

THE SUPREME COURT HOLDING

In a 4-2 opinion the Supreme Court affirmed the lower court's denial of Cooper's motion to withdraw his plea. The Court opined that since the record did not show that Hicks' violation of Professional Conduct rules prevented Cooper from receiving effective counsel, his motion to withdraw his plea based on ineffective counsel was not erroneously denied. The Court garnered strength for this conclusion by noting that even Cooper's new counsel, at the plea withdrawal hearing, had no quarrel with the plea agreement Hicks and Cooper had reached with the State.. And the Court declined Cooper's invitation to conclude that a lawyer who violates rules of professional conduct is necessarily providing ineffective counsel.
In reaching its holding, the Court reviewed important legal principles surrounding plea withdrawals. It points out the differences between what a defendant must show to justify a pre-sentencing plea withdrawal as compared to the more rigorous post-sentencing plea withdrawal standard. And it reprises the law surrounding an infective counsel claim.

Key Points

1. The proving of an ineffective counsel claim and a violation of Supreme Court Rules of Professional Conduct result from two separate and distinct inquiries. Proving one does not necessarily prove the other. It is entirely plausible that a lawyer can violate a conduct rule and still not be providing ineffective counsel.
2. An ineffective counsel claim requires a showing that a lawyer's deficient performance prejudiced the defendant.

3. To justify a motion to withdraw a pre-sentencing plea, the defendant must show by a preponderance of the evidence a fair and just reason for doing so. Even if the defendant meets this hurdle, the State can defeat the motion if it shows substantial prejudice if the motion is granted.
4. To justify a motion to withdraw a post-sentencing plea, a defendant must show by clear and convincing evidence that the denial of his motion would cause him a manifest injustice.

The Bottom Line

The fact that a lawyer violated a rule(s) of Professional Conduct, during representation of a client, does not automatically mean that the lawyer provided ineffective counsel.

State v. Dennis L. Schwind
Decided by the Wisconsin Supreme Court- 05/03/19

INTRODUCTION

In this case, the Wisconsin Supreme Court examined whether circuit courts have the inherent power to reduce a term of probation, even if the statutory requirements of 973.09(3) (d) are not met. In a 4-2 decision the Wisconsin Supreme Court held that a circuit court does not have the inherent power to reduce a term of probation, and can only do so if 973.09(3) (d) is satisfied.

FACTS

In 2001, Schwind pled guilty to first-degree sexual assault of a child, incest with a child, and engaging in repeated acts of sexual assault of the same child. Schwind's guilty plea required him to register as a sex offender. The court accepted Schwind's guilty plea and imposed a ten-year prison sentence, but stayed the sentence and placed him on probation for a term of 25 years. The conditions of his probation included one year of jail time with work release privileges.

In 2002, Schwind violated the conditions of his probation; he had physical contact with his victim, had sexual contact with an animal. had unsupervised contact with children, and failed a sex offender treatment program. The State did not seek to rescind his probation but alternatively reached a deal with Schwind where he agreed to serve another one-year jail term. In 2014, after serving 13 years of his 25-year probation term, Schwind filed a motion for early termination of his probation.

WISCONSIN STAT. § 973.09(3) (d)

At the time Schwind filed his motion, there was only one statutory mechanism for reducing a probationary term, 973.09(3) (d), which permits a circuit court to reduce a probationary term if six requirements are met. These requirements are: 1) The department (corrections) petitions the court to discharge the person from probation, 2) The probationer has completed 50 percent of his or her period of probation, 3) The probationer has satisfied all conditions of probation that were set by the sentencing court, 4) The probationer has satisfied all rules and conditions of probation that were set by the department, 5) The

probationer has fulfilled all financial obligations to his or her victims, the court, and the department, including the payment of any fine, forfeiture, fee or surcharge, or order of restitution, and 6) The probationer is not required to register as a sex offender.

Schwind did not meet these six requirements, and thus he asked the circuit court to use its inherent authority, to grant his motion for a probationary term reduction.

PROCEDURAL HISTORY

The circuit court denied Schwind's motion for a probationary term reduction reasoning that whether or not they had the authority to entertain the motion, they would deny Schwind's request. Schwind then filed a motion to reconsider, and this time the circuit court held that it did not have the inherent authority to reduce a term of probation and could only do so if the six requirements of 973.09(3) (d) were met.

Schwind appealed, and the court of appeals affirmed the circuit court in an unpublished opinion. The court of appeals did not decide the question as to whether a circuit court has the authority to reduce a probation term, if 973.09(3) (d) was not satisfied. Instead, the court held that even if the circuit court had such authority, it could only be utilized in the same manner it could use its established authority to reduce a sentence. The court of appeals determined that none of the factors set forth to reduce a sentence were present in Schwind's case and thus, it affirmed the circuit court's denial of his motion.

Schwind then appealed to the Wisconsin Supreme Court who granted review. The matter was heard on oral argument on May 3, 2019.

THE SUPREME COURT HOLDING

The Wisconsin Supreme Court affirmed, finding that Schwind's motion for a reduction in his probationary term was properly denied as he did not satisfy the requirements of 973.09(3) (d), and the circuit court does not have the inherent power to reduce a probationary term under any circumstances outside the scope of 973.09(3) (d). The Court was unanimous in its view that the trial court properly denied Schwind's motion, and a majority of the Justices felt that Schwind's motion must fail, regardless of the individual circumstances of his case.

KEY POINTS

1) A circuit court can reduce a probationary term, only if all the rigid requirements of 973.09(3) (d) are met.
2) A circuit court has no inherent authority to reduce a probationary term.

3) The Court reminds us in this case that circuit courts do have the inherent authority to reduce sentences when 1) There is a clear mistake, or 2) There is a new factor, or 3) There is undue harshness or unconscionability.

The Bottom Line

Wisconsin courts do not have the inherent authority to reduce or terminate a probationary period. They can only do so if all the statutory requirements of Wisconsin Stat. §973.09(3) (d) are satisfied.

***State v. Bartelt*, 2018 WI 16**
Decided by the Wisconsin Supreme Court - February 2018

Issue:
The issue in this case is whether a person is in custody for *Miranda* purposes, when interrogated about a serious matter in a police station and after he makes incriminating statements. The Wisconsin Supreme Court, after noting that the defendant came in voluntarily, was not handcuffed, was consistently told he was free to go, and was allowed freedom of movement, was not in custody for *Miranda* purposes. Accordingly, when he mentioned that he wanted an attorney, that effectively ended the interview, but it did not represent an assertion of his *Miranda* right to counsel. So, the police were free to reinitiate contact with the defendant on the following day.

Facts:
The police were investigating a homicide and a recklessly endangering case, both of which occurred at a local park. The defendant was soon identified as a person of interest. The police made contact with the defendant and asked if he would meet the police at the Slinger P.D. The defendant readily complied with this request and he was taken to the department by two friends who waited for him at the station.

The defendant was escorted to an interview room where he met up with two detectives, both of whom were wearing casual clothes, with their badges on their belts and their guns holstered at their side. The detectives told the defendant that he was not in trouble, was not under arrest, and was free to go at any time he wished to. The police advised the defendant that they were investigating an incident at the park, and initially the defendant denied ever being at the park. As the interview continued, the police continued to hone in on the defendant and suggested that he was not being truthful. The police then overstated some of the evidence they had and advised the defendant that the evidence pointed rather conclusively to his being at the park. At one point during the interview, the defendant's phone rang, and the police allowed him to attend to the call. After time the defendant admitted to being at the park, that he had a knife, and that he went after the girl with the knife as he wanted to scare someone. Then the defendant said the girl screamed, he dropped his knife, and they both ran away.

After making these admissions the defendant was asked to make a written statement, to apologize to the girl and at this point the defendant said that he wanted an attorney. The police said sure and stopped the interview, and shortly thereafter the defendant was arrested. Throughout this interview the defendant was never read his *Miranda* warning. The next day the police reinitiated contact with the defendant and read him his *Miranda* rights. The defendant waived his rights and admitted to being the park when the homicide took place, and after making those statements the police found physical evidence connected to the murder at the park, that contained both the victim's DNA and the defendant's.

The Defendant's Argument:
The defendant argued that once he told the police during the first interview about scaring the girl with a knife he was not free to go and thus he was in custody when he asked for an attorney. Accordingly, the police violated his *Miranda* right to counsel when they reinitiated contact with him and everything he told the police on that day should be suppressed.

The Court's Holding:
The Wisconsin Supreme Court found that the defendant was not in custody during the first interview, as he came on his own, was told he was free to go, and came with friends, suggesting he fully expected to be allowed to leave. The court further opined that even when the defendant made incriminating statements, those statements did not morph the non-custodial situation into a custodial one, because the police did not change their attitude, the environment, or tell the defendant that he was no longer free to leave. So, when the defendant said he wouldn't talk anymore without an attorney he was not exercising his *Miranda* rights as he was not in custody. Thus, his expressed wish for an attorney did not bar the police from re-initiating contact as it would have if he made the request for counsel while in custody. So, as the police did Mirandize the defendant during the second interview, and the defendant waived, his subsequent statements were admissible.

Notes:
The court reaffirmed the rule that *Miranda* rules are only implicated when a suspect asserts his rights while in custody. Asking for a lawyer when not in custody does not bar the police from reinitiating contact.
It is also noteworthy, that when a subject makes incriminating statements, while not in custody, this fact does not automatically transform a non-custodial environment into a custodial one. It is one factor, but in this case, it was overcome by all the other factors pointing to non-custody.