Constitutional Law

Free Speech – Harassment Injunctions

***Kindschy v. Aish*, 2024 WI 27 (filed June 27, 2024)**

HOLDING: The harassment injunction issued in this case violated the respondent's First Amendment rights.

SUMMARY: Respondent Aish protests outside family planning clinics to "warn women [seeking abortions] they will be accountable to God on the day of judgment if they proceed" and to attempt to persuade clinic staff to work elsewhere (¶ 3). Between 2014 and 2019 he regularly protested at two clinics where petitioner Kindschy worked as a nurse practitioner. Aish's conduct during that time consisted mainly of holding up signs quoting Bible verses and preaching his Christian and anti-abortion beliefs broadly to all staff and visitors. Beginning in 2019, however, he began directing his comments toward Kindschy, singling her out with what she believed to be threatening messages, including statements that "bad things are going to start happening to [Kindschy] and [her] family," she "could get killed by a drunk driver tonight," and she "would be lucky if [she] got home safely" (¶ 12).

Kindschy petitioned for a harassment injunction under Wis. Stat. section 813.125. The circuit court thereafter issued a four-year injunction that prohibited Aish from speaking to Kindschy or going to her residence "or any other premises temporarily occupied by [Kindschy]" (¶ 7). Aish appealed and in a published decision the court of appeals affirmed the issuance of the injunction. *See* 2022 WI App 17. In a majority opinion authored by Justice Dallet, the supreme court reversed the court of appeals.

The injunction in this case is a content-based restriction, which may pass constitutional muster in two ways: 1) if the regulation restricts speech that falls into a historically unprotected category, such as "fighting words," incitement to imminent lawless action, or – as relevant here – "true threats"; or 2) if the regulation restricts otherwise protected speech but satisfies strict scrutiny: that is, if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end (¶ 11).

The majority did not decide if Aish's statements were true threats (that is, serious expressions conveying that a speaker means to commit an act of unlawful violence). The supreme court held that even if they were, the harassment injunction still violates the First Amendment because the circuit court did not make the necessary finding that Aish "consciously disregarded a substantial risk that his communications would be viewed as threatening violence" (¶ 13).

This finding is required under the recent decision in *Counterman v. Colorado,* 600 U.S. 66 (2023), which was decided after the circuit court issued the injunction in this case. *Counterman* held that in a criminal prosecution for harassment premised on true threats, the First Amendment requires the government to prove at a minimum that the defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence" – a recklessness standard (¶ 15). Though *Counterman* involved a criminal prosecution, the court in this case concluded that the decision likewise applies to civil harassment injunctions premised on true threats (*see* ¶ 21).

The court further held that the injunction under review cannot clear the high bar of strict scrutiny. Said the majority: "Even if the interests Kindschy identified are compelling, an injunction still must be narrowly tailored to protect those interests. Here, the injunction orders Aish to avoid any location Kindschy might be, effectively prohibiting Aish from speaking not just to Kindschy, but to others at the clinic or anywhere else that she might be. In doing so, the injunction burdens significantly more speech than is necessary to protect individual privacy, freedom of movement to and from work, and freedom from fear of death. Therefore, it cannot survive strict scrutiny" (¶ 24) (citation omitted).

Accordingly, the supreme court concluded that the injunction against Aish violates the First Amendment. It remanded the matter to the circuit court with instructions to vacate the injunction. In a footnote, the court observed that the circuit judge "need not dismiss the petition and is free to conduct additional fact-finding to consider whether an injunction premised on new facts complies with the First Amendment" (¶ 2 n.1).

Justice R.G. Bradley filed an opinion concurring in the judgment, in which Chief Justice Ziegler joined.

Criminal Procedure

Search and Seizure – Vehicle Stop – Reasonable Suspicion

***State v. Wiskowski*, 2024 WI 23 (filed June 18, 2024)**

HOLDING: The defendant's Fourth Amendment rights were violated. Police officers lacked reasonable suspicion to stop the defendant's car and investigate him for operating while intoxicated (OWI), and under a community-caretaking rationale, continuation of the stop was unreasonable.

SUMMARY: The defendant fell asleep at the wheel of his vehicle while in line at a McDonald's drive-through lane at around 1 p.m. Employees woke him up and called the police. An officer arrived and observed the defendant drive away. The officer followed but did not observe any traffic violations or "abnormal" driving before stopping him. The defendant told the officer that he had been working for 24 hours.

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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"[The officer] later testified that, up to this point, the defendant did not appear sleepy, was not slurring his speech or suffering from any obvious medical issue like a heart attack or seizure, and was otherwise 'acting normal.' He also testified that he did not see or smell any alcohol on [the defendant], nor did he observe any other signs of intoxication" (¶ 5).

At this point, another officer arrived. A record check revealed the defendant had three prior convictions for OWI. One officer asked the defendant to leave the vehicle, which he did. The defendant admitted drinking "a couple" beers. One officer drove the defendant to the police station, where he performed field tests and was later arrested for OWI.

The defendant's motion to suppress the evidence gathered after the traffic stop was denied, the court concluding that the police were acting as "community caretakers." The defendant pled guilty and appealed the lawfulness of the stop. In an unpublished order, the court of appeals affirmed.

The supreme court reversed in a majority opinion authored by Justice Hagedorn that analyzed traffic stops under the Fourth Amendment in light of the community caretaking doctrine. "Applying these principles to this case, we conclude that even if the original stop was a bona fide community caretaking activity, Officer Simon unreasonably extended the stop beyond its original justification" (¶ 25).

"In short, Officer Simon's original community caretaking justification of helping a member of the public who is in need of assistance dissipated after their initial encounter. At this point, the restriction on Wiskowski's liberty should have ended. The stop transformed from a welfare check into the 'detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,' without the attendant reasonable suspicion necessary to justify further detention.... Officer Simon ceased being a community caretaker and, thus, had no authority to extend the stop on that basis" (¶ 28).

Justice Hagedorn also filed a separate concurring opinion that was joined in part by Justice R.G. Bradley and Justice Protasiewicz. First, Justice Hagedorn wrote that the state was wrong to raise a "reasonable suspicion" argument before the supreme court that it had not raised in the circuit court. Second, he discussed why the case law on community caretaking should be refined "to better accord this legitimate function" of police work with the Fourth Amendment (¶ 30).

Justice Protasiewicz also concurred, joined by Justice A.W. Bradley. She urged the court to address "confusion in the law" regarding a respondent's ability to raise alternative grounds for an affirmance (¶ 77).

Chief Justice Ziegler dissented "because, among other things, this case does not develop the law and is at most error correction. Our court should not accept review merely to correct error" (¶ 98).

Elections

Voting – Drop Boxes

***Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32 (filed July 5, 2024)**

HOLDING: Wisconsin Statutes section 6.87(4)(b)1. allows for the use of secure drop boxes for the return of absentee ballots to municipal clerks.

SUMMARY: In this case the petitioners challenged *inter alia* the requirement that absentee ballots be returned only by mail or in person to the clerk's office and not to a secure drop box. The circuit court dismissed the claim, concluding that it was bound by *Teigen v. Wisconsin Elections Commission,* 2022 WI 64, 403 Wis. 2d 607, 976 N.W. 2d 519, which held that Wis. Stat. section 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks (*see* ¶ 2).

The case was before the supreme court on bypass from the court of appeals. In a majority opinion authored by Justice A.W. Bradley, the supreme court reversed the decision of the circuit court.

Wisconsin Statutes section 6.87(4)(b)1. provides that "the envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." There was no assertion in this case that using a drop box is "mailing" a ballot and thus the court focused on the requirement that the ballot be "delivered in person, to the municipal clerk issuing the ballot or ballots."

The majority concluded that delivery to a drop box constitutes delivery "to the municipal clerk" within the meaning of the statute. "A drop box is set up, maintained, secured, and emptied by the municipal clerk. This is the case even if

the drop box is in a location other than the municipal clerk's office. As analyzed, the statute does not specify a location to which a ballot must be returned and requires only that the ballot be delivered to a location the municipal clerk, within his or her discretion, designates" (¶ 26). The majority further concluded that the *Teigen* decision upon which the circuit court relied and that held that the statutes prohibit ballot drop boxes "was unsound in principle" (¶ 49). Accordingly, the court overruled it.

The majority indicated that "our decision today does not force or require that any municipal clerks use drop boxes. It merely acknowledges what Wis. Stat. § 6.87(4)(b)1. has always meant: that clerks may lawfully utilize secure drop boxes in an exercise of their statutorily-conferred discretion" (¶ 6).

Justice R.G. Bradley filed a dissenting opinion that was joined in by Chief Justice Ziegler and Justice Hagedorn.

Family Law

Termination of Parental Rights Proceedings – Withdrawal of No-Contest Plea in Grounds Phase – Judicial Discretion in Disposition Phase

***State v. B.W. (In re Termination of Parental Rts. to B.W.)*, 2024 WI 28 (filed June 27, 2024)**

HOLDINGS: 1) The respondent failed to make a prima facie showing that the plea colloquy in the disposition phase of this termination of parental rights (TPR) case was defective. 2) The circuit court appropriately weighed the statutory factors when terminating the respondent's parental rights.

SUMMARY: The state sought to terminate the parental rights of B.W. to his child. TPR cases such as this are conducted in two phases. In the grounds phase of the case, the state must prove by clear and convincing evidence that there are grounds for termination. If "grounds" are proved, then the court proceeds to the dispositional phase, in which "the best interests of the child" is the prevailing factor.

In this case, B.W. entered a no-contest plea in the grounds phase and the circuit court terminated his parental rights to his child in the disposition phase. Thereafter B.W. brought a postdisposition motion to withdraw his no-contest plea. He argued that the plea colloquy in the grounds phase was defective because the circuit court miscommunicated that a clear, satisfactory, and convincing burden of proof applied not only to the grounds phase but also the disposition phase.

B.W. contended that the burden of proof is a trial right and when the court described B.W.'s rights at the grounds phase and then advised B.W. that he would have "all those same trial rights" at disposition, the court misinformed him that this heightened burden of proof, rather than the "best interests of the child" standard, would apply at disposition. B.W. argued that because of this alleged miscommunication, he was not properly advised about the potential ramifications of pleading no contest to grounds. He also claimed that in the disposition phase, the court improperly relied on the assurance of the proposed adoptive parent that she would allow B.W. to continue to visit and "co-parent" the child (¶ 3).

The circuit court denied B.W.'s motion to withdraw his no-contest plea without holding an evidentiary hearing. In an unpublished decision, the court of appeals affirmed.

In a majority opinion authored by Chief Justice Ziegler, the supreme court affirmed. It concluded that B.W. failed to make a prima facie showing that the plea colloquy was defective. At the plea hearing, the circuit court properly informed B.W. that the prevailing factor at disposition is the statutory standard: "the best interests of the child" (*see* ¶ 51). Though the circuit court erroneously stated at the initial appearance in the case that the state would have to prove by clear, convincing, and satisfactory evidence that it would be in the child's best interest that B.W.'s parental rights be severed (*see* ¶ 9), what mattered to the appellate court was what was said at the plea colloquy (*see* ¶ 49 n.13). At that colloquy, the court explained three times that the "best interests of the child" standard would apply at disposition (*see* ¶ 62). The circuit court did not characterize the clear and convincing burden of proof applicable in the grounds phase as a trial right that would be applicable at disposition (*see* ¶ 65). In sum, the plea colloquy was sufficient and B.W.'s motion to withdraw his no-contest plea was not entitled to an evidentiary hearing (*see* ¶ 68).

The court also concluded that "at disposition, the circuit court did not erroneously exercise its discretion by relying on the proposed adoptive parent's testimony that post-termination, she would allow B.W. to continue to visit with [the child] and that they would 'co-parent.' The court did not fail to consider that this testimony was an 'unenforceable promise,' nor did the court 'hinge' termination on this testimony. The circuit court properly exercised its discretion, considering the testimony and weighing the statutory dispositional factors of Wis. Stat. § 48.426(3)" (¶ 5).

Chief Justice Ziegler also filed a concurring opinion, which was joined in by Justice R.G. Bradley. Justice A.W. Bradley filed a concurring opinion in which Justice Protasiewicz joined.

Termination of Parental Rights Proceedings – Defaults – Court's Competency

***State v. R.A.M. (In re Termination of Parental Rts. to P.M.)*, 2024 WI 26 (filed June 25, 2024)**

HOLDING: In a termination of parental rights (TPR) case involving a parent's failure to appear, the court lacks competency to proceed to a dispositional hearing when it does not wait the statutorily required two days.

SUMMARY: R.A.M. is the parent of a child born in 2015. In 2017, R.A.M. was convicted of abusing the child and sentenced to one year of confinement in prison and two years of extended supervision. In 2021, the state filed this petition for termination of R.A.M.'s parental rights because the child had resided outside the home for more than three years. In July 2022, R.A.M. failed to appear in court despite the court's order that she do so; the court then granted a default motion in the grounds phase of these TPR proceedings. The circuit court then immediately proceeded to the dispositional phase of the case, concluding that termination of R.A.M.'s parental rights was in the child's best interest.

In an unpublished decision, the court of appeals reversed, holding that the circuit court lost competency when it did not wait the two days required by statute before proceeding to disposition.

The supreme court affirmed in a majority opinion authored by Justice Karofsky. The court held that "Wis. Stat. § 48.23(2)(b)3. is unambiguous, allowing us to rely on its plain language without reliance on extrinsic sources. That plain language dictates that when a court finds that a parent's failure to appear was egregious and without justifiable excuse, there is a presumption that the parent has waived their right to

counsel, and, importantly for this case, the court must wait two days to hold the dispositional hearing" (¶ 17).

Moreover, the circuit court's failure to wait the two days resulted in the court's loss of competency. The court held that "[b]ecause the two-day waiting period is central to the statutory scheme, a court lacks competency to proceed to a dispositional hearing when it fails to wait at least two days after finding a parent's absence to be egregious and unjustifiable" (¶ 25).

Chief Justice Ziegler dissented, joined by Justice Hagedorn, on grounds that the majority did not properly apply the statutes to the facts of this case (*see* ¶ 33).

Mental Health Law

Recommitments – Notice – Defaults – Involuntary Medication

***Waukesha Cnty. v. M.A.C. (In re Mental Commitment of M.A.C.),* 2024 WI 30 (filed July 5, 2024)**

HOLDINGS: Notice of recommitment must be given to the subject as well as counsel, the same notice must be given for involuntary-medication hearings, default judgments cannot be entered for recommitment proceedings, and the county failed to provide sufficient evidence to support an order for involuntary medication.

SUMMARY: M.A.C. was involuntarily committed in 2020. In 2022, the county sought to extend her commitment. The court scheduled a hearing, but the county was unable to locate her. On the date of the hearing, M.A.C did not appear and M.A.C.'s appointed lawyer said she had been unable to contact M.A.C. as well. The circuit court found M.A.C. in default and ordered that she be recommitted and involuntarily medicated (*see* ¶ 1). In an unpublished decision, the court of appeals affirmed.

The supreme court reversed in an opinion authored by Justice Protasiewicz. The court held "that (1) under our statutes a subject individual is entitled to notice of recommitment and involuntary medication hearings – notice to counsel only is not enough, (2) our statutes do not allow default judgment at those hearings, and (3) the County provided insufficient evidence for M.A.C.'s involuntary medication" (¶ 3). The plain text of Wis. Stat. section 51.20(10)(a) required the county to provide notice to the subject individual (*see* ¶ 30). So too for the involuntary medication hearing; Wis. Stat. section 51.61(1)(g)3. required notice to the subject (*see* ¶ 38). Finally, the court also held that "default judgment is not available at recommitment hearings or at involuntary medication hearings" (¶ 41).

In addressing the notice and default issues, the supreme court also reexamined *Waukesha County v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140. The court overruled *S.L.L.* as to notice (*see* ¶ 35) and *S.L.L*'s determination that defaults were permitted as to both recommitment and medication (*see* ¶ 50). "We hold that under our statutes, a circuit court may not enter default judgment for recommitment proceedings" (¶ 55).

Finally, the supreme court held that the county failed to provide sufficient evidence to support an order for involuntary medication (*see* ¶ 63).

Justice Hagedorn concurred. He joined the majority on the notice holdings but expressed doubts about its reading of *S.L.L.*

Justice R.G. Bradley concurred in part and dissented in part. She agreed that the county had failed to offer sufficient evidence to support involuntary medication. She disagreed with the majority's treatment of *S.L.L.*

Chief Justice Ziegler dissented. "The

majority should exercise restraint instead of wading into issues that go beyond the arguments and merits of the case. Once the majority determined that notice must be provided to M.A.C., no other issues remain" (¶ 83).

Real Property

Condemnation – Sidewalks – "Pedestrian Ways"

***Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25 (filed June 19, 2024)**

HOLDING: Condemnation of property to build a sidewalk did not violate statutes that provide that property cannot be acquired by condemnation to establish or extend a "pedestrian way."

SUMMARY: The village of Egg Harbor, in Door County, developed a plan to address safety concerns at a busy intersection in the village. Building a sidewalk there would help solve the problem, but it required condemnation of 0.009 acres of property belonging to plaintiff Sojenhomer. Sojenhomer contested the condemnation by bringing suit under Wis. Stat. section 32.05(5). In the suit, Sojenhomer alleged that the condemnation violates Wis. Stat. sections 32.015 and 61.34(3)(b), which provide that property cannot be acquired by condemnation to establish or extend a *"pedestrian way"* – a phrase that Wis. Stat. section 346.02(8)(a) defines as "a walk designated for the use of pedestrian travel." Sojenhomer argued that sidewalks are pedestrian ways and that the village therefore lacked authority to condemn the property to build a sidewalk.

The circuit court granted summary judgment in favor of the village. In a published decision, the court of appeals reversed. *See* 2023 WI App 20. In a majority opinion authored by Justice Dallet, the supreme court reversed the court of appeals.

Wis. Stat. section 346.02(8), which is titled "Applicability to Pedestrian Ways," provides as follows: "(a) All of the applicable provisions of this chapter pertaining to highways, streets, alleys, roadways and sidewalks also apply to pedestrian ways. A pedestrian way means a walk designated for the use of pedestrian travel. (b) Public utilities may be installed either above or below a pedestrian way, and assessments may be made therefor as if such pedestrian way were a highway, street, alley, roadway or sidewalk."

The majority concluded that when this section is read as a whole, there are "several indications that the definition of pedestrian way does not include sidewalks.... [B]oth § 346.02(8)(a) and (b) use the terms 'sidewalk' and 'pedestrian way' in ways that signify that each term has a separate, non-overlapping meaning" (¶ 18). For example, pedestrian ways are not sidewalks but should be treated "as if" they were for utility-installation and assessment purposes (*id.*).

The court also concluded that statutory history and the broader statutory context lend further support to its holding that sidewalks fall outside the definition of pedestrian way (*see* ¶ 21). Lastly, the court found it significant that the Wisconsin Legislature chose to omit sidewalks from the limitations on condemnation in Wis. Stat. sections 32.015 and 61.34(3)(b) (*see* ¶ 25).

In sum, the court concluded that "the definition of 'pedestrian way' in § 346.02(8)(a) does not include sidewalks, and accordingly [it held] that the limitations on condemnation in §§ 32.015 and 61.34(3)(b) did not prohibit the Village from condemning Sojenhomer's property to build a sidewalk" (¶ 26).

Chief Justice Ziegler filed a dissenting opinion that was joined in by Justice R.G. Bradley and Justice Hagedorn.

State Constitutional Law

Separation of Powers – Core Executive Powers

***Evers v. Marklein*, 2024 WI 31 (filed July 5, 2024)**

HOLDING: The legislative review provisions governing expenditures under the Knowles-Nelson Stewardship Program, which are codified in Wis. Stat. section 23.0917(6m) and (8)(g)3., are unconstitutional.

SUMMARY: In 1989, the Wisconsin Legislature created the Knowles-Nelson Stewardship Program (hereinafter "the program") to acquire land to expand nature-based outdoor recreational opportunities and protect environmentally sensitive areas. The program allows the Department of Natural Resources (DNR) to purchase land or disburse state funds to local governments and nonprofit organizations to acquire land for nature-based recreation. Currently, the legislature has authorized the DNR to obligate up to $33,250,000 in each fiscal year through 2025-26 for land-acquisition projects.

In this original action, Governor Tony Evers and other petitioners brought a facial challenge to the constitutionality of Wis. Stat. section 23.0917(6m) and (8)(g)3., which establish a legislative review process requiring the DNR to notify the legislature's Joint Finance Committee (JFC) if it intends to obligate state funds for certain land-acquisition projects. The statutes allow the JFC to indefinitely delay an expenditure if one of its members requests a meeting on the proposed expenditure. The petitioners contended that the legislature thereby intruded upon the executive branch's core power to execute the law by authorizing a legislative committee to halt expenditures for land-conservation measures after the legislature has already appropriated the money through the budget process.

In a majority opinion authored by Justice R.G. Bradley, the court concluded that "these statutes interfere with the executive branch's core function to carry out the law by permitting a legislative committee, rather than an executive branch agency, to make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent. A statute authorizing the legislative branch to exercise core powers of the executive branch violates the constitutional separation of powers and cannot be enforced under any circumstances. The legislative review provisions governing expenditures under the [p]rogram in Wis. Stat. [section] 23.0917(6m) and 23.0917(8)(g)3. are unconstitutional" (¶ 19).

The court said that these statutes "effectively create a legislative veto, allowing the JFC to interfere with and even override the executive branch's core power of executing the law" (¶ 24). This violates the separation of powers structurally enshrined in the Wisconsin Constitution (*see* ¶ 2).

Justice A.W. Bradley filed a concurring opinion in which Justice Dallet and Justice Protasiewicz joined. Justice R.G. Bradley filed a concurring opinion. Justice Dallet filed a concurring opinion that was joined by Justice A.W. Bradley, Justice Karofsky, and Justice Protasiewicz. Chief Justice Ziegler filed a dissent. **WL**