Marquette Law Review

Volume 60
Issue 2 *Winter 1977*

Article 7

Criminal Justice

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Moreover, the court held that once the certificate of title is passed the warranty provisions of chapter 342 of the Wisconsin Statutes preclude the application of the Uniform Commercial Code with respect to a warranty exclusion. The transfer of an interest in an automobile may precede the conveyance of the certificate, and under these circumstances the Uniform Commercial Code and its warranties would be applicable.[121] But once the certificate of title is transferred, the Code no longer applies and the seller is held to the warranty required by section 342.15(1).[122]

This conclusion, while consonant with the intendment of the Wisconsin Vehicle Code, nonetheless introduces the possibility of an automobile purchaser being left in the very situation the statute attempts to avoid. For example, if the title certificate to the automobile is withheld by the seller even after delivery of the automobile, the purchaser is protected only if the seller's warranty of title under section 402.401 of the Commercial Code has not been modified or excluded.

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CRIMINAL JUSTICE

I. PRE-TRIAL STAGE

Since the decision was rendered, *Hadley v. State*[1] has been used extensively to successfully argue denial of the constitutional right to a speedy trial based on the *Barker v. Wingo*[2] test. *Foster v. State*[3] began the predictable trend to narrow the scope of *Hadley*. In *Foster*, the defendant was arraigned on two felony charges on April 26, 1971. Trial was set for May 27, 1971, but was adjourned by stipulation, and the defendant specifically

121. *Id.* at 765, 235 N.W.2d at 463.
122. *Id.* at 766, 235 N.W.2d at 464.

1. 66 Wis. 2d 350, 225 N.W.2d 461 (1975).
2. 407 U.S. 514 (1972). In *Barker* the court noted that a defendant's constitutional right to speedy trial can be determined only on an ad hoc basis in which the conduct of the prosecution and the defendant are weighed and balanced. Among factors which courts should assess in determining whether a particular defendant has been deprived of his right are length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
3. 70 Wis. 2d 72, 233 N.W.2d 411 (1975).

waived his right to speedy trial. Eighteen months later, the defendant entered a guilty plea, and appealed the conviction asserting his denial to a speedy trial. For six of the eighteen months the defendant was an absconder. The court held that the period of time while an absconder "is not to be considered as a delay related to his right to speedy trial."[4] Also, after the defendant's apprehension, it took two months to return him to Wisconsin because he had charges pending in six other states. Upon his return to Wisconsin, the defendant spent the next three months awaiting trial on a federal charge. This period of time, the court ruled, should also not be considered in a claim of denial of the right to a speedy trial. "The one-after-another trial of resultant charges is a consequence of the wide-ranging criminal activities that does not constitute a denial of speedy trial on any one of them."[5]

The court found, without any reference to the *Hadley* rule, that under these circumstances the delay was not unreasonable and thus further analysis of the factors in the *Barker* balancing test was unnecessary.

The *Barker* test surfaced again in *State v. Rogers.*[6] The defendant was charged with obstructing an officer and five motor vehicle code violations stemming from a one-car accident, which occurred eighteen months earlier. At that time the defendant was district attorney for the county in which the accident occurred. The trial court dismissed the complaint ruling that the delay between the date of the offense and the institution of criminal proceedings deprived the defendant of due process based on the balancing test of *Barker.* The supreme court found it inappropriate to apply the *Barker* test to a prearrest delay problem.[7] Rather, the standard established in *United States v. Marion*[8] governed. That standard required that actual prejudice to the defendant's case must be shown to have resulted from the delay. The United States Supreme Court, however, stated, "[W]e need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prose-

4. *Id.* at 14, 233 N.W.2d at 412.
5. *Id.* at 15, 233 N.W.2d at 413.
6. 70 Wis. 2d 160, 233 N.W.2d 480 (1975).
7. *Id.* at 165, 233 N.W.2d at 483.
8. 404 U.S. 307 (1971).

cution."[9] The majority on the Wisconsin Supreme Court apparently felt that this language required that a second prong be added to the *Marion* standard: that there be intentional prosecutorial delay. In dissent, Chief Justice Wilkie stated that *Marion* should be interpeted to mean that actual prejudice alone can be sufficient to warrant dismissal.[10] The court then examined the record and noted that any claim of actual prejudice was unsubstantiated. It held that even if the allegations of inconvenience, indignity, anxiety and financial loss resulting from the delay and the undue publicity surrounding it were true, "they do not rise to the level of intentional government action to gain tactical advantage or to harass."[11]

II. TRIAL CONSIDERATIONS

In *Peters v. State,*[12] a conviction was reversed in the interest of justice based on the prejudicial joinder of two charges. The defendant was charged with theft, burglary, and obstructing an officer in violation of Wisconsin Statutes section 946.41(2)(b). The charges of burglary and obstructing an officer were tried together. The joinder was technically proper under the general rule that, if evidence of each crime is admissible in regard to the other crime, the two crimes may be tried together.[13] The court emphasized, however, that the fabrication of an alibi could not be relied upon by the State as affirmative proof of any of the elements of the burglary charge. "The state must prove beyond a reasonable doubt all elements of the crime of burglary by evidence independent and separate from the evidence relating to fabrication of alibi."[14] The court then pointed out that the danger of prejudice in the joinder of these charges could be overcome by a proper cautionary instruction, as was illustrated in *United States v. Pacente.*[15] Since only part of this

9. *Id.* at 324.
10. 70 Wis. 2d at 167, 233 N.W.2d at 484 (Wilkie, C.J., dissenting).
11. 70 Wis. 2d at 166-67, 233 N.W.2d at 484.
12. 70 Wis. 2d 22, 233 N.W.2d 420 (1975).
13. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).
14. 70 Wis. 2d at 31, 233 N.W.2d at 425.
15. 503 F.2d 543, 547-48 (7th Cir. 1974). The approved instruction reads as follows: The indictment that I am going to refer to in a few moments is not evidence of the defendant's guilt, it is simply, as I told you before [presumably on voir dire], the manner by which the government accuses a person of a crime and you should not be prejudice[d] against a defendant because an indictment has been returned against him. . . .

instruction was given, the court ordered a new trial in the interest of justice pursuant to Wisconsin Statutes section 251.09.

Curiously, the supreme court hinted that the charge of obstructing an officer may have been a case of overcharging. The decision noted that previous cases in Wisconsin on convictions for obstructing an officer had always involved physical abuse of the officer while performing his official duties.[16] The court admonished,

> [B]efore such a charge should be made under sec. 946.41(2)(b), Stats., the district attorney should have sound reasons for believing that statements made by a suspected defendant to the police in terms of an alibi were made for the purpose of deceiving and misleading the police, and not simply out of a good-faith desire to defend against an accusation of crime.[17]

Whether one can actually distinguish between these two motives ought to provide some entertaining courtroom argument.

Another conviction was reversed in *State v. Spraggin.*[18] In this case the defendant was originally charged with two separate felony counts of receiving stolen property, namely a revolver and a television set. The trial court, on motion of the State, consolidated the two counts into a single felony on the State's theory that both items were received by the defendant in one transaction. Despite the evidence that the two items were received separately, and that the revolver had a cash value of $80 and the television a value of $100, the defendant was convicted of a felony. The supreme court, relying on the rationale set forth in a Florida case, *Hamilton v. State,*[19] held that the defendant was convicted of merely two misdemeanors:

> Receiving or concealing different articles of stolen property at different times on separate and unconnected occa-

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You are instructed to consider the testimony given by the defendant Pacente before the Grand Jury on February 22nd only as evidence under Count 2 of the indictment and you should not consider it as evidence on any other count in the indictment. . . .

Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count.

16. 70 Wis. 2d at 29, 233 N.W.2d at 424.

17. *Id.*

18. 71 Wis. 2d 604, 239 N.W.2d 297 (1976).

19. 129 Fla. 219, 176 So. 89, 92 (1937).

> sions, constitute separate offenses and cannot be prosecuted as one crime, in one count, though all of the property is afterwards found in the possession of the defendant at the same time and place.[20]

The court pointed out that the state rashly assumed that a single felonious transaction had conclusively occurred, and that each stolen item exceeded $100 in value. The court, however, ruled that these were jury questions.

This decision also established a rule for determining "value" of stolen property in the context of receiving stolen property. "Value . . . is usually considered to mean 'fair market value' at the time of reception."[21] In determining this value, such measures as market value at the time of theft, original retail cost, and expert's testimony on market value may be considered, but these evaluations should indicate that "the original cost may not necessarily be equatable with the appropriate market figure for the period when the goods are charged as received."[22]

A note should be made of the following change in appellate procedure. Failure to raise issues in the circuit court on misdemeanor appeals from the county court constitutes a waiver of the right to review those issues on appeal to the supreme court. In *State v. Killory*,[23] the defendant was convicted of a misdemeanor, and appealed to the circuit court as provided by Wisconsin Statutes section 974.01 on the issues of the constitutionality of a statute and the sentence imposed. Appeal to the supreme court was from the order of the circuit court affirming the judgment of the county court. The defendant sought review of questions relating to trial court denial of a motion to dismiss, jury instructions, admissibility of certain evidentiary items, and the sufficiency of evidence. None of these matters had been presented to the circuit court for consideration. The supreme court denied the State's motion to strike portions of the defendant's brief relating to these four issues, but continued: "Henceforth, however, such a motion will be granted unless in a proper case and for reasons of judicial administration and policy it is necessary to consider new issues raised for the first

20. 71 Wis. 2d at 613, 239 N.W.2d at 308.
21. *Id.* at 620, 239 N.W.2d at 308.
22. *Id.* at 621, 239 N.W.2d at 309.
23. 73 Wis. 2d 400, 243 N.W.2d 475 (1976).

time on appeal to this court."[24] The court indicated that the purpose for directing appeal of misdemeanors to the circuit court was to provide for economic and orderly administration of justice.[25] Failure to raise all issues to the circuit court severely hampered the effectiveness of such a procedure.

III. Post Trial Motions

In *Jones (Hollis) v. State,*[26] the court clarified procedural questions that have reoccurred regarding motions for reconsideration of sentence under the rule of *Hayes v. State.*[27] The defendant originally moved for modification of sentence within ninety days of his sentence. That motion was denied. When the defendant again sought modification more than one year later, the trial court apparently felt it lacked jurisdiction to consider the motion. The supreme court took the opportunity to set forth the following procedure: The *Wuensch*[28] rule allows the trial court to review its own sentence for abuse of discretion, *i.e.,* unduly harsh or unconscionable sentences, even if no "new factors" were present. The ninety day limit of *Hayes* is to be strictly followed under a *Wuensch* motion. On the other hand, the court reiterated that the ninety day limit under *Hayes* was regulatory and not jurisdictional on the exercise of the trial court's inherent power to modify its sentence at any time providing "new factors" were present.[29] The phrase "new factor," as defined in another case this term,

> refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.[30]

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24. *Id.* at 410, 243 N.W.2d at 482.

25. *Id.* at 411, 243 N.W.2d at 482, *citing* Harms v. State, 36 Wis. 2d 282, 286, 153 N.W.2d 78 (1967).

26. 70 Wis. 2d 62, 233 N.W.2d 441 (1975).

27. 46 Wis. 2d 93, 175 N.W.2d 625 (1970). The *Hayes* rule in substance states that the time within which to move for modification of a sentence imposed on or after July 1, 1970, should be 90 days from the date of sentencing. The court, however, need not decide the motion within this period.

28. State v. Wuensch, 69 Wis. 2d 467, 230 N.W.2d 665 (1975).

29. 70 Wis. 2d at 72, 233 N.W.2d at 446-47, *citing* State v. Foellmi, 57 Wis. 2d 572, 205 N.W.2d 144 (1973).

30. Rosado v. State, 70 Wis. 2d 280, 234 N.W.2d 69 (1975).

In *Mulkovich v. State,*[31] prejudicial error was found in the refusal by the trial court to permit substitution of the defendant's retained counsel for the purposes of sentencing. The supreme court noted that even though the adequacy of trial counsel was not questioned, improperly forcing a defendant to accept an attorney not of his own choice in cases involving retained, rather than appointed counsel, would violate due process and render a sentence void.[32] The court formulated this guideline: trial courts abuse their discretion by refusing a request for retained counsel or for substitution of counsel when there is no evidence that the proposed counsel is inadequate and there is no evidence that a change of counsel is made for the purpose of delay.[33]

IV. SENTENCING AND PROBATION

The defendant in *Kubart v. State*[34] received a prison sentence for burglary convictions. Using the equal protection argument asserted in *Byrd v. State,*[35] he sought credit for the four days spent in the county jail awaiting transfer to prison. The defendant attacked the constitutionality of Wisconsin Statutes section 973.15(1)[36] which specifically precludes crediting such "dead" time toward the term of sentence. There was no expansion of the much-litigated perimeters of the *Byrd* decision in this case. The court found no denial of equal protection to the indigent since even a wealthy person released on bail under the terms of the statute would not receive credit for the time await-

31. 73 Wis. 2d 464, 243 N.W.2d 198 (1976).

32. 73 Wis. 2d at 474, 475, 243 N.W.2d at 203, 204, *citing* Glasser v. United States, 315 U.S. 60 (1942) and Reickauer v. Cunningham, 299 F.2d 170 (4th Cir. 1962).

33. 73 Wis. 2d at 474, 243 N.W.2d at 203, 204.

34. 70 Wis. 2d 94, 233 N.W.2d 404 (1975).

35. 65 Wis. 2d 415, 424, 222 N.W.2d 696, 701 (1974). In *Byrd* the court, under the rationale of equal protection, held that a defendant must be given credit for time spent in custody prior to conviction to the extent that such time added to sentence imposed exceeds the maximum sentence permitted for such offense. Such time spent in custody, however, must be the result of the criminal charge for which a prison or jail sentence is imposed or as a result of the conduct on which such charge is based. In addition, such custody must be the result of the defendant's financial inability to post bail. *Byrd* did not, however, deal with the question of post conviction custody.

36. WIS. STAT. § 973.15(1) (1973) states as follows:

> All sentences to the Wisconsin state prisons shall be for one year or more. Except as otherwise provided in this section, all sentences commence at noon on the day of sentence, but time which elapses after sentence while the defendant is in the county jail or at large on bail shall not be computed as any part of his term of imprisonment.

ing transfer to an institution.[37]

The court also held that the four day delay was reasonable in light of the time required to make necessary transportation arrangements. This rationale follows *Mitchell v. State*,[38] where a two-and-one-half week period elapsed between the defendant's return to jail from a hospital commitment for a presentence work-up under the Sex Crimes Act and his actual sentencing. This delay was held not unreasonable and not violative of either due process or equal protection. Admitting that the test of reasonableness in a post-sentencing situation was difficult to apply, the supreme court, in *Kubart*, did indicate that an unreasonable delay could give rise to constitutional problems. It urged the legislature to amend Wisconsin Statutes section 973.15(1) and incorporate that portion of the American Bar Association's *Standards Relating to Sentencing Alternatives and Procedures*[39] which allows credit for time spent in custody after sentencing awaiting transfer to an institution.[40]

This suggestion was reinforced in the context of a probation revocation in *State ex rel Solie v. Schmidt*.[41] Solie was confined in the Milwaukee County jail from approximately October 20, 1973 until January 10, 1974 awaiting the decision that his probation was revoked on the ground he left the state without the prior consent of his probation officer. The supreme court ruled that the period of time Solie spent in jail was unreasonable, and due process required that the eighty-two days be deducted from the two year sentence.[42] Apparently applying the *Byrd* rationale, the court reasoned that the stayed two year sentence to prison was the maximum period Solie could be incarcerated, since a revocation could not increase or decrease the sentence

37. 70 Wis. 2d at 104, 233 N.W.2d at 410.

38. 69 Wis. 2d 695, 230 N.W.2d 884 (1975).

39. Section 3.6(a):

> Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.
>
> This is consistent with the federal statute that gives credit for the time spent awaiting transfer. 18 U.S.C. § 3568.

40. 70 Wis. 2d at 106, 233 N.W.2d at 411.

41. 73 Wis. 2d 76, 242 N.W.2d 244 (1976).

42. *Id.* at 82, 242 N.W.2d at 247.

imposed by the court.

This decision creates more uncertainty in this area. A strict application of the *Byrd* principle would limit inquiry only to those situations where a "maximum" sentence had been imposed, *i.e.*, where the trial court imposed a prison sentence but stayed execution and placed the defendant on probation. Equal protection challenges, however, will arise from parolees and those on "straight" probation. For that reason and in response to Circuit Court Judge Robert Curley's comment[43] in this case, the legislature should provide credit for jail time in all revocation cases.

Three cases this term clarified the misconception surrounding the use of confinement in the county jail as a condition of probation under Wisconsin Statutes section 973.09(4). The confusion usually arose from a failure to clearly distinguish between a sentence under the Huber Law, section 56.08(1), and probation ordered pursuant to section 973.09(4). This latter section provides that a sentenced offender may be placed on probation with the condition that he be confined to the county jail between the hours of his employment.

In *State v. Schaller*[44] the defendant was charged with having intentionally escaped from the custody of the LaCrosse County sheriff, contrary to Wisconsin Statutes section 946.42(2)(c).[45] He was in jail pursuant to section 973.09(4) having received probation on a burglary conviction with the condition that he be confined in the county jail between the hours of his employment. The charge of escape resulted from his

43. "And I am going to say it again for the record, we have been screaming about it because we sit here and see the inequities that result by the fact that the State does not provide a sufficient number of hearing officers." *Id.* at 81-82, 242 N.W.2d at 247.

44. 70 Wis. 2d 107, 233 N.W.2d 416 (1975).

45. WIS. STAT. § 946.42(5) (1973) provides in part as follows:

(5) In this section:

(a) "Escape" means to leave in any manner without lawful permission or authority;

(b) "Custody" includes without limitation actual custody of an institution or of a peace officer or institution guard and constructive custody of prisoners temporarily outside the institution whether for the purpose of work or medical care or otherwise. Under s. 56.08(6) it means, without limitation, that of the sheriff of the county to which the prisoner was transferred after conviction. It does not include the custody of a probationer or parolee by the department of health and social services or a probation or parole officer unless the prisoner is in actual custody after revocation of his probation or parole or to enforce discipline or to prevent him from absconding . . . .

failure to return to the jail for over twenty-four hours after his release for work.

In concluding that a probationer in such a situation could not be charged under the criminal statutes with escape during the release period, the supreme court held that custody of the probationer during the release time lay solely with the probation department, and not with the sheriff. Consequently, this infraction should be treated as a violation of the condition of probation. "There being no basis for the sheriff to deny or revoke their probation and enforce imprisonment, 'constructive custody' does not exist in the release periods."[46]

The sheriff's custody of the probationer is coextensive with that of the probation department during the period of an individual's actual confinement in the jail. Wisconsin Statutes section 973.09(4) prescribes that a probationer is subject to all the rules of the jail and the discipline of the sheriff. Under these circumstances, an escape from the confines of the jail rather than absconding during the release period would constitute escape under section 946.42.[47] The provisions of section 973.09(4) are to be distinguished from the Huber Law privilege, which is a sentence to the county jail, and places the prisoner under the sole custody of the sheriff. Whereas probation is an alternative to a sentence according to *Prue v. State*,[48] incarceration as a condition of probation is not a sentence and does not transform probation into a sentence. Under the Huber Law statute, the sheriff, as sole custodian, has the necessary power to impose confinement rather than allow release. The sheriff thus has the constructive custody referred to in section 946.42(5)(b).

The importance of this distinction surfaced in *Yingling v. State*.[49] There, the trial court stayed a two-year prison sentence, placed the defendant on probation and sentenced him to the county jail under the Huber Law for the first six months of probation. Subsequently, the trial court treated the incarceration as a condition of probation, revoked the probation, and imposed the original sentence. The probationer raised the question of double jeopardy, claiming that he was punished

46. 70 Wis. 2d at 113-14, 233 N.W.2d at 419.
47. *Id.* at 113, 233 N.W.2d at 419.
48. 63 Wis. 2d 109, 114, 216 N.W.2d 43, 45 (1974).
49. 73 Wis. 2d 438, 243 N.W.2d 420 (1976).

twice for the same offense. Although the case was moot since the probationer had been released from custody, the supreme court emphasized that these two statutory provisions could not be used interchangeably without running the risk of an inappropriate sentence in excess of statutory authority or of a "colorable" claim of double joepardy. The crux is again the fact that Huber Law privileges are a sentence, while confinement to the county jail as a condition of probation is not a sentence. "Accordingly, where a criminal case is disposed of under the Huber Law, the defendant has in fact received a sentence, and any attempt to alter that disposition by the reimposition of criminal sanctions may well result in a double joepardy situation."[50]

The third case, *State v. Gloudemans,*[51] held that Wisconsin Statutes section 973.09(4) requires mandatory work-release privileges upon confinement in the county jail as a condition of probation. The court ruled that the trial court exceeded its authority under section 973.09(4) when, as a condition of probation, it ordered the defendant confined in the county jail for one year without the work-release privileges.[52]

V. PAROLE AND PAROLEE RIGHTS

Since *State v. Goulette*[53] subjected the refusal of the parole board to grant discretionary parole to judicial review by writ of certiorari and *Morrissey v. Brewer*[54] applied due process requirements to parole revocations, the area of parole and parolee rights has experienced increased litigation. Three cases in this area were particularly noteworthy this term.

In *State ex rel Tyznik v. Department of Health and Social Services,*[55] the court declared that within sixty days of the date of its decision, the parole board must formulate criteria and standards for determining whether or not to grant discretionary parole to an inmate. The court also required the parole board, when denying a parole application, to spell out its reasons for the denial and support the same by particular evidence in the

50. *Id.* at 440, 243 N.W.2d at 421.
51. 73 Wis. 2d 514, 243 N.W.2d 220 (1976).
52. *Id.* at 517-18, 243 N.W.2d at 221-22.
53. 65 Wis. 2d 207, 222 N.W.2d 622 (1974).
54. 408 U.S. 471 (1972).
55. 71 Wis. 2d 169, 238 N.W.2d 66 (1976).

prisoner's records and the parole proceedings.[56] These requirements will facilitate judicial review and satisfy due process by balancing the interest of the individual inmate in the expectation of conditional liberty under discretionary parole with the interest of the state in maintaining the orderly administration of the parole system.[57] The reasons given by the parole board for denial of Tyznik's application were:

> (1) "that parole at this time would depreciate the seriousness of this man's criminal behavior," (2) "there is reasonable probability that this man would not comply with the requirements of parole because of his poor adjustment while under previous supervision," and (3) "continued confinement is necessary to protect the public from further criminal activity."[58]

The court noted that these reasons were adequate to support the parole board's decision to defer Tyznik's parole for twelve months, but only because the court had the full record to consider. The standard laid down by the court requires greater specificity from the parole board.

In *Putnam v. McCauley*,[59] Wisconsin Statutes section 53.11(7)(b) was found violative of the equal protection clause insofar as it failed to provide for the exercise of discretion by the division of corrections to allow credit for street time for mandatory release violators.

The issue was raised in a declaratory judgment action by the plaintiff, who received a sentence of an indeterminate term not to exceed five years beginning July 17, 1969. This sentence was revoked after the defendant received a discretionary parole and passed his mandatory release date while on the street. Upon his return to prison, the defendant was given a new discharge date of June 26, 1975, nearly one year longer than his original sentence.

When a criminal defendant is sentenced to prison, a mandatory release date is computed by crediting the defendant with all the statutory[60] and extra[61] good time that can be earned. This period sets the date on which the individual must

56. *Id.* at 173, 238 N.W.2d at 68.
57. *Id.* at 172, 238 N.W.2d at 68.
58. *Id.* at 173-74, 238 N.W.2d at 68.
59. 70 Wis. 2d 256, 234 N.W.2d 75 (1975).
60. WIS. STAT. § 53.11 (1973).
61. WIS. STAT. § 53.12 (1973).

be released from prison, barring forfeiture of good time by misconduct. If a parolee reaches his mandatory release date on the street, he is simply continued on parole. The problem arises when a parolee who has reached his mandatory release date has his parole revoked. Wisconsin Statutes section 53.11(7)(b) requires that upon revocation such parolee must "serve the remainder of his sentence" which "shall be deemed to be the amount by which his original sentence was reduced by good time."[62] Thus, if an inmate's original sentence were reduced by two years good time, he would be required to serve two years upon revocation of his parole after the mandatory release date regardless of how close he was to his discharge date.

The court held that the statute failed an equal protection scrutiny because no rational basis justified the statute's distinction between the due process protections afforded a discretionary parole violator versus a mandatory release violator. Presently, due process procedures, as mandated by *Wolff v. McDonnell*[63] and *Steele v. Gray*,[64] are available to the discretionary parole violator. A case-by-case decision is made to determine the amount of good time that is forfeited after parole revocation. *Putnam* extended this due process protection to mandatory release violators. The narrow effect of the decision should be noted. The decision required only that discretion be exercised by the division of corrections. This eliminated the automatic loss of all good time earned; however, the court did not explain how that discretion should be exercised. Conceivably, the division could determine that a particular mandatory release violator should serve his entire remaining sentence anyway.

The constitutionality of the Out of State Parolee Supervision Act,[65] was upheld in *State ex rel Niederer v. Cady*.[66] The Act allows a probationer or parolee convicted within a "sending state" to reside in another state while on probation or parole pursuant to a compact between the two states. While in the "receiving state," the parolee is supervised by the appropriate probation or parole authorities of that state.

62. WIS. STAT. § 53.11(7)(b) (1973).
63. 418 U.S. 539 (1974).
64. 64 Wis. 2d 422, 219 N.W.2d 312, 223 N.W.2d 614 (1974).
65. WIS. STAT. § 57.13 (1973).
66. 72 Wis. 2d 311, 240 N.W.2d 626 (1976).

In this case the petitioner, a Wisconsin parolee, took advantage of the privilege extended by section 57.13 to hold a job in Minnesota. His subsequent conduct resulted in a return to Wisconsin and a revocation of his parole. When his petition for a writ of habeas corpus was quashed, Niederer challenged section 57.13 on three grounds: that he was denied an extradition hearing prior to his return to Wisconsin, that this denial violated the equal protection clause, and that under *Morrissey v. Brewer*[67] he was entitled to a preliminary hearing at the location in Minnesota where the incident occurred that triggered the revocation.

Section 57.13(3)[68] in particular was scrutinized since it specifically abrogated the necessity of an extradition hearing. The only formality required under section 57.13(3) for the retaking of an out-of-state parolee is that the official from the "sending state" who desires to retake the parolee must establish his authority and the identity of the parolee. The court held that the rights afforded under extradition acts are statutory and are granted only to the asylum state. "The statutory extradition process is a right conferred upon the asylum state whereby, as a sovereign, it may assert its rights to protect its own citizens or persons within its boundaries from unjust criminal actions that may be brought by a sister sovereign state."[69] A constitutional issue exists, however, if the state procedures constitute a denial of equal protection. The equal protection argument developed by Niederer was premised on the fact that an absconder is entitled to an extradition hearing, while a parolee under section 57.13 is not. This challenge was dismissed by the

67. 408 U.S. 471 (1972).

68. WIS. STAT. § 57.13(3) (1973) provides as follows:

That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party thereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

69. 72 Wis. 2d at 317, 240 N.W.2d at 630.

court on the ground that a rational basis for distinction between the two groups could be made. The purpose of an extradition hearing is to identify an individual as the person wanted by another state. A parolee under section 57.13 has been so identified in advance by the receiving state consciously accepting the obligation of supervision. Since all parolees are treated alike and all absconders are treated alike, no equal protection violation exists.[70]

The court also pointed out that *Morrissey v. Brewer* was applicable to the section 57.13 situation. A preliminary determination was required at or near the place where the alleged parole violation took place to establish that probable cause existed for believing that the conditions of parole had been violated.[71] In *Niederer,* the need for this hearing was obviated by the fact that the parolee had entered a guilty plea to the offense on which the revocation was based.

JOHN S. JUDE

DOMESTIC RELATIONS

I. ALIMONY

Societal acceptance of informal living arrangements between unmarried men and women has begun to carry with it certain legal consequences. Affirming a trial court's finding that a "de facto" marriage relationship existed between an ex-wife and another man, the Wisconsin Supreme Court in *Taake v. Taake*[1] held that the ex-wife's cohabitation with this man constituted a sufficient change in circumstances to expunge delinquent alimony payments and terminate the husband's alimony obligation. The supreme court, however, would not bar future alimony since the wife was not actually married. Other circumstances could warrant a resumption of alimony in some degree at a future date.

In 1966 E. Robert Taake and Barbara A. Taake were granted a divorce. The judgment awarded Mrs. Taake certain

70. *Id.* at 323, 240 N.W.2d at 633.
71. *Id.* at 326, 240 N.W.2d at 634-35.

1. 70 Wis. 2d 115, 233 N.W.2d 449 (1975).