Criminal Justice

Lawrence J. Lasee

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defined by statute: today's usury is yesterday's acceptable, legal way of conducting business.

JOHN D. CENTER

CRIMINAL JUSTICE

An examination of the recent term of the Wisconsin Supreme Court, in the criminal justice field, verifies an observation made in this publication a year ago, that the court's treatment of defendant's rights had approached a degree of stability, and that the criminal justice system would settle into a temporary period of applications of those decisions without significant change in the court's characterization of the rights themselves. In addition, the court has been more preoccupied with pre-conviction remedies than with post-conviction remedies. This shift is illustrated by a reduction in the number of cases construing the law of search and seizure, an area which has been a hot bed of activity in recent years. Despite this relative quietude, cases in the criminal justice field continue to constitute the vast majority of the court's written decisions and remains an ever changing area of the law.

I. Pre-Trial Considerations

Perhaps one of the most confusing and troublesome controversies in the law of search and seizure concerns the propriety of inventory searches of vehicles coming into the custody of the police after the driver has been arrested. In State v. McDougal, the court addressed the obvious confusion existing in the law and arrived at a determinative decision.

The fact situation of McDougal was fairly typical: The defendant was stopped for a traffic violation, and a succession of extenuating circumstances resulted in his being taken to the

1. Term of Court, Criminal Justice, 58 Marq. L. Rev. 313, 317 (1975):
It appears that Mabra and Robinson are in part attempts to eliminate litigation on searches and seizures. The attempt may prove to be unsuccessful, because a possible result of the decisions will be merely to shift litigation to related areas of the criminal law. Now exposed to more search opportunities, defendants may more often and more vigorously dispute "probable cause" for their investigatory stopping and arrests. An arrest may be challenged as pretextual for the search, and disputes may arise as to the timeliness of a search vis-a-vis its justifying arrest. [citations omitted].

2. 68 Wis. 2d 399, 228 N.W.2d 671 (1975).
police station where a search of the vehicle was conducted. The search revealed a pair of locked suitcases in the trunk which contained a large quantity of marijuana. On a motion to suppress, the state contended that the search was a valid inventory search conducted for the purpose of protecting the police and the defendant, and therefore the seizure of the marijuana was valid.

The Wisconsin court found a split in authority on this question. One view focuses on whether a search has in fact occurred. This determination is based on whether a true inventory, as opposed to a pretext for exploration, was made. The second view assumed that a search has in fact occurred, and focuses upon what it considers the decisive issue, the reasonableness of the intrusion.

The court in *McDougal* adopted the second view:

We conclude that the latter line of cases not only compels the conclusion that an inventory search is a "search," but also represents the better reasoned approach. An inventory search can be a serious intrusion into the private affairs of the individual. Cases holding that such conduct is not a search limit their inquiry to the question of whether the search is a bona fide inventory. Cases taking the opposite view consider that question, but also concern themselves with the "reasonableness" of the intrusion, i.e., once it is established that it is not improper to conduct an inventory, the question becomes whether the manner in which the inventory is conducted, its scope, is reasonable. We believe the severity of the intrusion and its possibility for abuse requires this double-barreled protection.3

Thus, as a result of *McDougal*, the rule applicable to custodial/inventory searches will no longer exclusively examine the inventory nature of the search, but will additionally consider the reasonableness of the intrusion, irrespective of that initial determination. The court then applied this "double-barreled" rule to the facts and concluded that opening the locked suitcases found in the trunk was an unreasonable intrusion, and held that the evidence should be suppressed. The court decided that the suitcases could easily have been inventoried as units; and therefore, that entry into the locked cases was unreasonable.

3. *Id.* at 409-10, 228 N.W.2d at 676.
One of the more complex criminal cases decided during the term was *State v. George*, a commercial gambling case. The defendant alleged that the complaint was deficient because instead of alleging specific gambling violations occurring on specific dates, it generally alleged numerous violations occurring over an extended period of time. Only one of the charges mentioned a specific game on a specific date. The court addressed two issues: first, the multiplicity/duplicity question, and second, the question of gambling as a continuing offense.

The issue of multiplicity/duplicity rested upon the constitutional right of an accused to be informed of the nature and cause of the accusation. In this respect, the court relied upon the language of *Holesome v. State*:

In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant (can) determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense.

The facts of *George* were extremely complex in that the time periods designated in the charges often overlapped and, within these overlapping periods, different principals and transactions were involved. As an example, one count alleged that the defendant received bets on professional football games from September 15, 1972, to January 15, 1973, while another separate count charged the defendant with receiving bets on college football games during the same period of time. Additionally, two separate counts alleged receiving bets on college football games during the same time period, but alleging different bettors. The counts also failed to allege specific bets made on specific games.

The question of whether commercial gambling is a continuing offense was critical to the court’s determination that the two tests set down in *Holesome* were met. If a continuing offense could be charged, a conviction would bar any subsequent prosecution for specific acts of gambling within that designated time. On the other hand, if gambling were construed as a continuing offense, serious problems of defense would arise be-

4. 69 Wis. 2d 92, 230 N.W.2d 253 (1975).
5. 40 Wis. 2d 95, 161 N.W.2d 283 (1968).
6. Id. at 102, 161 N.W.2d at 287.
cause the defendant would have to defend against any number of specific acts allegedly constituting the continuing act of gambling. The court recognized the defense problems created, but offered no apparent solution. Although the decision suggests that the state may charge either separate offenses or a single continuing offense, it is unclear how the charge of a continuing offense could survive an attack based on the first requirement of Holesome. The problem faced by the defendant in George of not knowing for what specific acts he is being prosecuted and at which time such acts were committed, would invariably be present with any charge of a continuing offense of commercial gambling. Herein lies a serious deficiency in the decision. The obvious choice for the prosecution is to charge the separate offenses and avoid the potential challenge.

After examining section 945.03, the commercial gambling statute, and the effect of recent amendments on that section, the court determined that commercial gambling could be charged either as a single continuing offense or as multiple, separate charges. The section as it exists now makes it illegal to receive a bet or to offer to bet. Prior to a 1969 amendment, the section proscribed the receiving of bets or offers to bet. Relying upon section 990.01(1), which states that in construing laws the singular includes the plural and the plural includes the singular, the court found that the state has the option of charging the separate offense of receiving a single bet, or the continuing offense of receiving bets.

As to the appropriateness of the charge, the court found:

If the various counts of the complaint allege a series of continuous crimes they are multiplicitous because they divide a single charge (continuous commercial gambling) into several counts. If the several counts allege single bets they are duplicitous in that they join several transactions in a single offense, with the possibility that some but not all members of a jury could believe defendant guilty of one offense and

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7. Wis. Stat. § 945.03 (1973) reads in pertinent part as follows:

945.03 Commercial gambling. Whoever intentionally does any of the following is engaged in commercial gambling and may be fined not more than $5,000 or imprisoned not more than one year or both:

(2) For gain, receives, records or forwards a bet or offer to bet or, with intent to receive, record or forward a bet or offer to bet, possesses facilities to do so.

8. State v. George, 69 Wis. 2d at 100, 230 N.W.2d at 257.
others believe him guilty of another. A guilty verdict of all the jurors could be returned with the whole jury not in agreement as to the essential facts.9

The court ordered all the counts dismissed, except the one count charging a bet placed on a specific game on a specific date by a specific bettor. Thus when charging a defendant with commercial gambling, the state can either charge one, and only one count alleging a continuing offense, or charge any number of separate counts alleging individual acts of commercial gambling.

In State v. Interstate Blood Bank, Inc.,10 the court declared unconstitutional Wisconsin Statute section 146.31(1),11 which makes it a misdemeanor to operate a blood bank for commercial profit. The decision was based upon two grounds: first, the legislation is an interference with interstate commerce which is not justified by its alleged purpose, and second, that the statute violated the supremacy clause.

The defendant, a Wisconsin corporation, was a subsidiary of a corporation headquartered in Washington, D.C. At the time of the enactment of section 146.31(1), the defendant was the only corporation operating in Wisconsin as a blood bank for commercial profit. The defendant was permitted to operate under a federal license issued to a sister corporation in Chicago and shipped all the blood it received to Chicago, where it was distributed throughout the Midwest.

In addressing the interstate commerce issue, the court relied upon Pike v. Bruce Church, Inc.12 That case held that once a legitimate local purpose for the legislation can be found, the validity of the statute depends upon its effect on interstate commerce. The court assumed that a legitimate local interest existed and then found that the statute’s effect on interstate commerce was excessive since it not only regulated commerce, but effectively prohibited it.

In deciding the supremacy clause issue, the court cited Sperry v. Florida13 for the proposition that a state may not impose stricter standards of occupational licensing on federally

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9. Id. at 98-99, 230 N.W.2d at 257.
10. 65 Wis. 2d 482, 222 N.W.2d 912 (1974).
11. Wis. Stat. § 146.31(1) (1973) reads as follows: “(1) It is unlawful to operate a blood bank for commercial profit.”
licensed occupations, because such practices would in effect give states a power of review over federal determinations. Since the defendant in Interstate was licensed to operate a blood bank under federal authority, the state was precluded from legislating away that federal license. The court pointed out that the health-related policy considerations which supported the state legislation would nevertheless be protected by the federal licensing procedures. In addition, the court found that the legislation was ineffective in that it did not prevent blood collected by commercial agencies outside the state from being purchased by agencies within the state.

II. Trial Considerations

In Bellinder v. State the court addressed the question of whether a conviction in a juvenile court was a proper subject for cross-examination. The defendant had been convicted of indecent behavior with a child, based primarily upon the testimony of three minor male witnesses. The facts illustrated that the witnesses had been employed by the defendant to do work in and around the defendant’s house, and that consequently the juvenile spent considerable time at his house.

After the defendant was convicted by a jury, he filed a post-conviction motion raising the issue of whether a defendant has a right to cross-examine juvenile state’s witnesses regarding their probationary status and juvenile adjudications of delinquency. The trial court denied the defendant’s motion for post-conviction relief, and the supreme court initially affirmed. Later, the court reopened the case and requested the parties to prepare briefs limited to the issue of the scope and retroactive application of Davis v. Alaska. In that case, the United States Supreme Court determined that, notwithstanding the Alaskan law designed to protect the reputation of juveniles, an inquiry into the juvenile record of witnesses can be required under certain circumstances by the confrontation clause.

In Davis, a juvenile served as a key identification witness in a grand larceny and burglary case. The juvenile testified that he observed the defendant remove the stolen property from his car and put it in a ditch where it was eventually discovered by the police near the juvenile’s home. The juvenile

14. 69 Wis. 2d 499, 230 N.W.2d 770 (1975).
failed to contact the police, because he was afraid that the police would not believe him, and that as a result of his prior contacts with the police, they would suspect him of the crime. The defendant was denied the opportunity to cross-examine the juvenile as to his record which would have shown that he had been found delinquent on various theft-related counts. The defendant contended that given the nature of the juvenile’s record, his identification of the defendant might have been motivated by a desire to divert attention from himself. The defendant contended that the questions were not strictly intended to impeach the witness, but were intended to show potential bias or prejudice against the accused, causing him to make a faulty initial identification which in turn could have affected his subsequent in-court identification. The trial court refused to permit the questions to be asked and granted a pre-trial protective order in favor of the juvenile. The Supreme Court of Alaska affirmed. However, the United States Supreme Court found that the witness’ juvenile record was a proper area of inquiry on cross-examination:

The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green’s vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L. Ed. 624 (1931), as well as of Green’s possible concern that he might be a suspect in the investigation.16

The Court was not persuaded that the state’s interest in protecting a child from potential embarrassment or unfavorable exposure was a sufficient reason to deny the defendant his right to effectively confront his accuser:

In this setting, we conclude that the right of a confrontation is paramount to the State’s policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner’s right to probe into the influence of possible bias on the testimony of a crucial identification witness.17

But in Bellinder, the Wisconsin court did not decide

16. Id. at 318.
17. Id. at 320.
whether *Davis* applied to this case because the court held that, by failing to raise the issue at trial, the defendant had waived his right to object on appeal. Yet the trial counsel obviously operated under existing case law and statutory authority which declared that questions related to juvenile records of witnesses are inadmissible. Nevertheless, the case is helpful because it sets out the procedural steps to follow in order to elicit evidence of juvenile records. The first step is to ask the question. The examiner must then present an offer of proof that there in fact is a juvenile record and that this record could conceivably create some bias or prejudice on the part of the witness against the accused. The *Davis* case suggests that if this foundation is established, testimony regarding prior juvenile record is admissible.

The rationales of *Davis* and *Bellinder* taken together suggest that witnesses with juvenile records may become increasingly susceptible to attacks on their credibility. It is clear that such records will not be admissible as a general rule for purposes of impeachment, because *Davis* does not hold that a juvenile record in and of itself is evidence of untrustworthiness or incredibility. *Davis* holds only that if the record suggests some inherent prejudice or bias on the part of the juvenile witness against the accused, then that record is admissible to impeach the reliability and credibility of that witness.

In *Caccitolo v. State*, the court clarified an evidentiary ruling concerning the admissibility of statements made in the presence of a defendant. The defendant in *Caccitolo* was charged with intentionally intercepting a wire communication. The defendant assisted a co-conspirator, McGaw, in intercepting the conversations of McGaw's wife. The trial court allowed Lee, McGaw's neighbor, to testify to a statement made by

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48.38 Effect of juvenile court proceedings. (1) No adjudication of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any such child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction. The disposition of any child's case or any evidence given in the juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court, nor shall such disposition or evidence disqualify a child in any future civil service examination, appointment or application.
20. 69 Wis. 2d 499, 502, 230 N.W.2d 771 (1975).
21. 69 Wis. 2d 102, 230 N.W.2d 139 (1975).
McGaw in the defendant's presence. The trial court based its decision to admit the statement on the grounds that a statement made in the presence of a defendant is not hearsay.

The supreme court affirmed the trial court's decision to admit the statement but disagreed with its reasoning. The presence of a defendant does not in itself mean that a statement is not hearsay. It is hearsay, but the hearsay rule is satisfied by the opportunity to cross-examine:

The hearsay rule is designed to reject untrustworthy utterances. Since the person whose interest was damaged by the statement did not avail himself of the opportunity to refute it, it is presumably trustworthy. He has foregone the opportunity of an out-of-court disputation, and the statement is admissible, not because it is not hearsay, but because the hearsay rule, at least to an extent consistent with judicial policy of ascertaining trustworthiness, has been satisfied.2

The logic behind the Caccitolo hearsay exception is less than convincing. It assumes, for instance, that the defendant heard the statement, that he was in a position to refute it, that there were no physical, emotional or mental pressures to remain silent at that instant, or that he cared to respond to it. To expect that a potential defendant would cross-examine a declarant on every inaccurate statement made in his presence is impractical. The court in Caccitolo is requiring a more comprehensive cross-examination than is generally possible in a courtroom situation, and to this extent, the defendant's rights are not fully protected.

Caccitolo, together with the hearsay exceptions in Chapter 908, illustrates that there has been a liberalization of the rules with respect to the admissibility of hearsay.

III. POST-CONVICTION CONSIDERATIONS

In State v. Van Duyse,23 the supreme court had occasion to review and revise the requirements of appellate practice. Van Duyse represented himself throughout most of the proceedings in which he was eventually convicted of fraud in the sale of securities. He attempted to appeal his conviction, but unfortunately failed to meet several of the statutory requirements. He filed his motion of appeal in county court within the 90-day

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22. Id. at 110, 230 N.W.2d at 143.
23. 66 Wis. 2d 286, 224 N.W.2d 603 (1975).
limit as required by section 974.03, but he failed to serve the notice on the district attorney until twelve days after the statutory limitation. The defendant contended that he left copies to be served with a responsible party at the courthouse. The court reasoned, however, that because service was never made by that "responsible party," the appellant had failed to comply with sections 274.11(1) and 269.37.

The case is important because it overrules the language of *Scheid v. State*, which held that failure to serve notice deprived the court of subject matter jurisdiction. Relying upon the language in section 274.11(4), the court determined that subject matter jurisdiction automatically attaches upon the entry of an appealable judgment, and that failure to comply with statutory procedural requirements more properly relates


974.03 Appeals to supreme court; time for taking. In lieu of prosecuting a writ of error, either party may appeal to the supreme court in the manner provided in civil cases. The service of a notice of appeal or the issuance of a writ of error shall be made within 90 days after the entry of judgment or order appealed from. If a motion for a new trial has been made within the 90-day period, an appeal from the denial of the motion or from the judgment of conviction may be taken with 90 days after pronouncement of the order denying the motion or within 90 days after such motion is deemed overruled.


274.11 Appeal, how taken and perfected; notice; costs. (1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each party adverse to him upon the appeal who appeared in the action or proceeding, and by filing a notice of appeal with the clerk of the court in which the judgment or order appealed from is entered. The notice shall state whether the appeal is from the whole of the judgment or order or from a part thereof, and if from a part only, shall specify the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action. All notices of appeal shall contain the names and addresses of counsel, if known, for all parties upon whom service is required.


269.37 Service on attorney; when service not required. When a party to an action or proceeding shall have appeared by an attorney the service of papers shall be made upon the attorney. When a defendant shall not have appeared in person or by attorney service of notice or papers in the ordinary proceedings in an action need not be made upon him unless he be imprisoned for want of bail.

27. 60 *Wis. 2d* 575, 211 N.W.2d 458 (1973).


(4) The right of appeal shall exist from the time of entry of the appealable order or judgment and in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time. The procedural requirements of subs. (1), (2) and (3) of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal.
to personal jurisdiction. In this respect, the court lacked juris-
diction over the State of Wisconsin as a party, and could not
hear the appeal. The difference is technical, but important, in
that personal jurisdiction can be waived by one of the parties,
whereas subject matter jurisdiction cannot.

The decision also overruled the prior decisions of Estate of
White29 and Maas v. W.R. Arthur,30 which had held that ac-
cepting and retaining an appellant's brief constituted partici-
pation in the proceedings, and amounted to a waiver of lack of
jurisdiction under section 269.51(1).31 In the instant fact situa-
tion, the district attorney accepted the brief prepared by the
appellant before making a motion to dismiss the proceedings.
The court held:

[T]hat mere retention of appellant's brief prior to making a
motion to dismiss is not participating in the appeal under sec.
269.51, Stats., and does not constitute a waiver of objection
to jurisdiction. The holdings in White and Maas that mere
retention of briefs constitutes participation in the appeal pro-
cess are overruled.32

In State ex rel. Warrender v. Kenosha County Court,33 the
supreme court dealt with the issue of whether a writ of habeas
corpus was an appropriate remedy to review a motion to sup-
press evidence. Generally, as pointed out in the decision, a writ
of habeas corpus is the proper remedy for challenging the juris-
diction of a trial court over a criminal defendant.34 It is most
properly used to challenge the validity of complaints and
bindovers.35

29. 256 Wis. 467, 41 N.W.2d 776 (1950).
30. 239 Wis. 581, 2 N.W.2d 238 (1942).

269.51 Irregularities and lack of jurisdiction waived on appeal; jurisdic-
tion exercised; transfer to proper court. (1) When an appeal from any court,
tribunal, officer or board is attempted to any court and return is duly made to
such court, the respondent shall be deemed to have waived all objections to the
regularity or sufficiency of the appeal or to the jurisdiction of the appellate
court, unless he shall move to dismiss such appeal before taking or participating
in any other proceedings in said appellate court. If it shall appear upon the
hearing of such motion that such appeal was attempted in good faith the court
may allow any defect or omission in the appeal papers to be supplied, either with
or without terms, and with the same effect as if the appeal had been originally
properly taken.
32. State v. Van Duyse, 66 Wis. 2d at 294, 224 N.W.2d at 607.
33. 67 Wis. 2d 333, 227 N.W.2d 450 (1975).
34. Id. at 338, 227 N.W.2d at 453.
Warrender was arrested pursuant to a warrant issued after he failed to appear in court on an ordinance violation. After he was taken into custody, a custodial search was performed, and a bag of marijuana was found. The defendant was eventually charged and convicted of possession of a controlled substance. The special treatment afforded by section 161.47(1), which grants a conditional discharge and defers conviction, was applied to the defendant. During the proceedings, Warrender had brought a motion to suppress the evidence due to an illegal arrest, which was denied by the trial court. He attempted to challenge the adverse ruling on the motion to suppress by way of habeas corpus.

The supreme court determined that, within the limited factual context of a "conviction" under section 161.47(1), the use of habeas corpus was a proper remedy to review a motion to suppress. Upon a motion for rehearing, the supreme court reiterated that the ruling was limited to the situation at hand; namely, a motion to suppress in a possession of a controlled substance case where the defendant had taken advantage of the section 161.47(1) opportunity.

On its motion for rehearing, the Kenosha County Court has argued that the opinion in this case validates the availability of habeas corpus as a remedy to challenge all orders denying motions for suppression of evidence. This is not correct. We limit the availability of habeas corpus as a remedy to review denials of motion to suppress to those drug cases where the preferential treatment under sec. 161.47(1), Stats., is available. In those cases, judgment of conviction may be deferred.


161.47 Conditional discharge for possession as first offense. (1) Whenever any person who has not previously been convicted of any offense under this chapter, or of any offense under any statute of the United States or of any state relating to narcotic drugs, marijuana or stimulant, depressant or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under s. 161.41(3), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for 2nd and subsequent convictions under § 161.48. There may be only one discharge and dismissal under this section with respect to any person.
and, therefore, the defendant cannot appeal to challenge the order denying the motion to suppress.\textsuperscript{37}

The decision was based upon the realization that where a defendant exercised the right to a conditional discharge, the opportunity to challenge an adverse decision on a motion to dismiss was lost, there being no "conviction" from which to appeal. In this respect, \textit{Warrender} is a logical decision as limited to the factual situation outlined by the court.

In the area of sentencing, the court announced a two-fold rule in \textit{Byrd v. State},\textsuperscript{38} which significantly altered the law in Wisconsin with respect to credit for pre-trial incarceration. The \textit{Byrd} case involved a defendant convicted of one count of fornication and two counts of false imprisonment for which he was given maximum sentences. The defendant claimed that he was in jail for a period of eighty-two days between the initial appearance and the ultimate sentencing, and argued on appeal that he should be given credit for his pre-conviction incarceration.

The court reached the decision:

\begin{quote}
(T)hat a defendant must be given credit for time spent in custody prior to conviction to the extent such time added to the sentence imposed exceeds the maximum sentence permitted under the statute for such offense, provided such time spent in custody was a 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, provided further that such custody was the result of the defendant's financial inability to post bail.\textsuperscript{39}
\end{quote}

The court relied upon the language in \textit{Culp v. Bounds}\textsuperscript{40} suggesting that where the statutory maximum sentence was given, the failure to give credit for pre-conviction incarceration violated the Equal Protection Clause of the Fourteenth Amendment when such incarceration results from the defendant's financial inability to raise bail. The language in \textit{Cheney v. State}\textsuperscript{41} and \textit{State v. Tew},\textsuperscript{42} supporting the rule that credit need not be given

\begin{flushright}
\textsuperscript{37} 67 Wis. 2d at 345, 227 N.W.2d at 456.  \\
\textsuperscript{38} 65 Wis. 2d 415, 222 N.W.2d 696 (1974).  \\
\textsuperscript{39} \textit{Id.} at 424, 222 N.W.2d at 701.  \\
\textsuperscript{40} 325 F. Supp. 416 (W.D. N.C. 1971).  \\
\textsuperscript{41} 44 Wis. 2d 454, 171 N.W.2d 339 (1969).  \\
\textsuperscript{42} 54 Wis. 2d 361, 195 N.W.2d 615 (1972).
\end{flushright}
for pre-conviction incarceration where a maximum sentence is imposed, was expressly overruled by the court in Byrd.\textsuperscript{43}

Additionally, the court held that before imposing sentences, trial courts must take into account the amount of time spent in pre-conviction custody. Where less than the statutory maximum is imposed, the defendant need not be given credit for pre-conviction incarceration, but the sentencing judge must at least consider this factor in the exercise of his sentencing discretion.

During the course of the term there were several opportunities for the court to apply the rule in Byrd. State v. Seals\textsuperscript{44} made it clear that Byrd requires credit for pre-conviction incarceration only in the event that the incarceration, when added to the sentence imposed, exceeds the statutory maximum, and not in every instance in which there is pre-conviction incarceration for whatever reason. The Byrd rule was not applied in Seals because the defendant had been given a sentence considerably less than the statutory maximum, and it was clear that the judge, in determining the length of sentence, was aware of the pre-conviction incarceration and apparently considered that factor relevant.

The question of when a challenge must be made to a sentence imposed in violation of the Byrd requirements arose in Hall v. State.\textsuperscript{45} The court re-examined the rationale of the Byrd decision and came to the conclusion that a failure to credit pre-trial incarceration and a failure to consider pre-trial incarceration were separate questions, and thus, motions based on either question must be afforded different treatment.

A violation of the first rule of Byrd may be raised under sec. 974.06, Stats., at any time while the sentence is being served. This is because such sentence denies a constitutional right of the accused and is greater than the maximum imprisonment prescribed by law for the offense, both of which are grounds for a motion for post-conviction relief under sec. 974.06. A violation of the second rule of Byrd is not grounds for a sec. 974.06 motion, because where there is no maximum sentence problem the failure of the trial court to take into account pre-trial detention because of indigency is an abuse of discretion rather than a denial of constitutional right. Such

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\textsuperscript{43} 65 Wis. 2d at 426, 222 N.W.2d at 702.
\textsuperscript{44} 65 Wis. 2d 434, 223 N.W.2d 158 (1974).
\textsuperscript{45} 66 Wis. 2d 630, 225 N.W.2d 493 (1975).
an abuse of discretion is challenged by a motion for modification of sentence, which was authorized in *Hayes v. State* (1970), 46 Wis. 2d 93, 175 N.W. 2d 625. *Hayes* requires that such motion be made within ninety days from the date of sentencing.\(^46\)

In *Mitchell v. State*,\(^47\) the court had occasion to decide two technical questions relating to *Byrd*. Mitchell was sentenced to two maximum terms of thirty years after conviction for rape and armed robbery, to run concurrently. On appeal the defendant contended that he was entitled to credit for the period of incarceration prior to sentencing, and also that he should be granted "good time" credit for this same period of presentence incarceration. The state contended that the defendant did not receive the statutory maximum since the sentences could have been consecutive.

The court decided the first issue, relating to pre-conviction incarceration, in favor of the defendant, relying upon *Hook v. Arizona*.\(^48\) "The mere fact that the trial court chose in the instant case to have the sentence run concurrently rather than consecutively does not change the fact that each of the sentences was the maximum sentence provided under the law."\(^49\)

With reference to credit for "good time," the court determined that the defendant was not entitled to such credit.

Under the rationale of the *Byrd* Case the preconviction time is not time spent on the sentence for which it could be argued that good-time should be credited; rather, the fact that a maximum sentence was imposed and the defendant was in jail unable to make bail because of indigency requires a reduction in the sentence, so that in the instant case each of the sentences should be for twenty-nine years and forty-three days and therefore the "good time" credit would not apply."\(^50\)

In other matters relating to sentencing, the court on two

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46. *Id.* at 633-34, 225 N.W.2d at 495.
47. 69 Wis. 2d 695, 230 N.W.2d 884 (1975).
48. 496 Fed. 2d 1172, 1174 (9th Cir. 1974).

The district court believed appellant had not been sentenced to the maximum because the sentences were to be served concurrently rather than consecutively. But we held in *Lee v. United States*, 400 Fed. 2d 185, 188 (9th Cir. 1968), that "each conviction is separate . . . if the statutory term is imposed, the order that the sentence run concurrently does not vitiate the contention that defendant received the maximum prison sentence."

49. 69 Wis. 2d 699, 230 N.W.2d at 886.
50. *Id.*
occasions pointed out what it considered to be deficiencies in statutory language with respect to the power of trial courts to impose sentences.

In the companion cases of Drinkwater v. State and Trotter v. State,\(^{51}\) the court determined that it was not within the authority of trial courts to impose sentences resulting from revocation of probation to run consecutive to previously imposed sentences. Both Drinkwater and Trotter were placed on probation after being found guilty of a criminal offense, and, during the probation period, they were again convicted of criminal offenses. Sentences were imposed for the latter convictions and ordered served. Subsequently, a probation revocation hearing was held and sentences were imposed to run consecutively to those imposed for the latter convictions.

On appeal, the defendants argued that section 973.10(2),\(^{52}\) requiring a probationer be sent to prison immediately upon revocation, applied to their probation revocations, and, as a result, the statutory language demanding that "the term of sentence shall begin on the day he enters prison" prevented the imposition of consecutive sentences in this situation. The state countered with the argument that section 973.15(1),\(^{53}\) which permits a sentence to commence at the expiration of a previously imposed sentence presently being served, applied and that judges therefore had the authority to impose consecutive sentences.

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51. 69 Wis. 2d 60, 230 N.W.2d 126 (1975).
52. Wis. Stat. § 973.10 (1973) provides in part:
   (2) If a probationer violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if he has already been sentenced, may order him to prison; and the term of the sentence shall begin on the date he enters the prison.
   973.15 Sentence, terms, escapes. (1) 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 is at large on bail shall not be computed as any part of his term of imprisonment. The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent or that it shall commence at the expiration of any other sentence, and if the defendant is then serving a sentence, the present sentence may provide that it shall commence at the expiration of the previous sentence. If a convict escapes, the time during which he is unlawfully absent from the prison after such escape shall not be computed as part of his term. Courts may impose sentences to be served in whole or in part concurrently with a sentence being served in a federal institution or an institution of another state.
The court thoroughly examined the history of the statutory sections involved, finding that they developed totally independently of each other and that section 973.15(1) was never intended to apply to probation revocation. Section 973.10(2) was the correct section to apply under the rule of construction that the specific supersedes the general. The court determined that the defendants' argument was the correct one: trial courts lacked the authority to impose consecutive sentences.

Factually, a different procedure was employed with respect to Drinkwater than was employed with respect to Trotter. Drinkwater was originally sentenced to four years but execution was stayed, and he was placed on probation. Trotter, on the other hand, had never been sentenced. Sentence had been withheld, and he was simply placed on four years probation. The state attempted to get some mileage out of this factual distinction, but the court pointed out that withholding the sentence did not affect the eventual result.  

The court admitted that the imposition of consecutive sentences may in some instances be desirable in the interest of public welfare. It did suggest a means whereby this end might be attained and included a rather strong suggestion that the legislature consider amending the statute accordingly. The court suggested that the sentencing judge upon a second conviction could withhold sentencing until after revocation of parole.

In Guyton v. State, the court prevented a trial court from achieving a result similar to that in Drinkwater and Trotter through use of a different means. The defendant was given an indeterminate sentence of not more than six years consecutive to any term that he serves as a result of any parole violations. The probation revocation process was not complete at the time of sentencing, and the trial court attempted to tack this sentence on to a term that did not yet exist. Relying on the language in section 973.15(1), the defendant argued that he could not receive a consecutive term because he was not "then serving a sentence." Section 57.072 states that time spent on parole or probation is not part of the sentence. The court accepted the argument of the defendant as legally
sound and pointed to what it considered a deficiency in the law, suggesting that statutory revision might in the future make this type of sentencing procedure appropriate.

In Drinkwater and Trotter, we invited the legislature's attention to sec. 973.15(1) in respect to the sentencing powers of a judge on a probation revocation. In view of the circumstances revealed in the instant case, we express the same concern in respect to a situation that arises when a parolee is convicted and sentenced for a serious crime but the procedures for revocation of the earlier parole have not yet been completed. 57

During the course of the term, the court dealt with two problems involving parole and parole hearings. State ex rel. Mueller v. Powers 58 involved an action for a writ of mandamus in which the petitioners, convicted and sentenced murderers, challenged the constitutionality of section 57.06(1)(a), as amended in 1973, as it applied to their eligibility for parole. They contended that under the statute prior to amendment they would have become eligible for parole after two years imprisonment, 59 whereas the amendment would have extended such period to five years. 60 The old statute provided that two years was the greatest term one could serve before being eligible for parole, whereas the amendment required the inmate to serve the minimum term where a minimum is provided. In effect the petitioners argued that the amendment acted as a ex post facto law when applied retroactively, as the chairman of the parole board was doing. The court, although determining

57. Id. at 667-68, 230 N.W.2d at 728.
58. 64 Wis. 2d 643, 221 N.W.2d 692 (1974).
59. Prior to amendment in 1973, Wis. Stat. § 57.06(1)(a) (1971) provided in part:

The department may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in the Milwaukee county house of correction or a county reforestation camp organized under s. 56.07, when he has served the minimum term prescribed by statute for the offense (which shall be one year unless a greater minimum is prescribed by the statute defining the crime) or one-half of the maximum of an indeterminate term or 2 years, whichever is least. . . .

60. As amended by sec. 300 of ch. 90, Laws of 1973, Wis. Stat. § 57.06(1)(a) reads as follows:

The department may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in the Milwaukee county house of correction or a county reforestation camp organized under s. 56.07, at any time if there is no minimum prescribed for the offense, or when he has served one-half of the minimum term prescribed by statute for the offenses . . . .
that the amendment was in fact an ex post facto law, found that the petitioners lacked standing to seek relief because they had not alleged that they had served the requisite two years, and that the right they sought to enforce had in fact not accrued to them.

The decision was premised upon the court's determination that Wisconsin law grants inmates the opportunity to be considered for parole after a given period of time as a matter of right. Once the right to parole eligibility was statutorily granted, the retroactive increase of the period before one becomes eligible was a violation of the inmates' constitutional rights.

The effect of the decision is that the 1973 amendment to 57.06(1)(a) does not apply retroactively, and inmates committed to penal institutions prior to the effective date of such amendment must be treated under the old eligibility statute.

The point should clearly be made that *Mueller* does not stand for the proposition that an inmate has a right to be paroled, only that he has a right to be considered for parole. The case reiterates the position that the right to refuse or grant parole lies within the discretion of the Department of Health and Social Services. In *State v. Goulette*,\(^6\) the supreme court held that a decision of a parole board is reviewable by writ of certiorari. The *Goulette* decision represents a rather significant departure from what had been the law in Wisconsin on this particular issue. In *Tyler v. State Department of Public Welfare*,\(^6\) a 1963 case, the court took the position that refusal to parole is not subject to judicial review.\(^6\) The court seemed impressed with an argument, urged by an amicus curiae brief submitted by the Wisconsin Civil Liberties Union Foundation, that more and more courts were following the rationale of *Johnson v. New York Board of Parole*\(^6\) to the extent that refusal to parole should be reviewable where the board's action is inconsistent with statutory directives or based on improper criteria.

The court examined the traditional use of the writ of certiorari, concluding that the writ is available where the statu-
tory appeal is inadequate or nonexistent. *Tyler* had the effect of cutting off any statutory appeal upon refusal to parole, and thus determined that such a decision could properly be appealed by writ of certiorari, subject as always to the discretion of the court to whom the writ is directed. In effect, the court extended the rationale of *State ex rel. Johnson v. Cady*, wherein the court determined that revocation of probation is appealable by writ of certiorari, and the same procedures applying in that situation, and in fact in any writ of certiorari review, would apply to this situation. [The reviewing court is limited to determining: (1) whether the board kept within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.]

LAWRENCE J. LASSE

DOMESTIC RELATIONS

I. NAME OF MARRIED WOMAN

Wisconsin this term joined the small number of jurisdictions that have determined whether a woman's surname changes to that of her husband by operation of law on marriage. In *In re Petition of Kruzel*, the court adopted the English common law rule that a woman's name does not automatically change when she marries. A married woman has the right, under this rule, to use either her own family name or her husband's name, and a change to the husband's name occurs, if at all, only through the wife's customary use of that name.

The petitioner, Kathleen Harney, was a teacher who at all times after her marriage had used her family name, Harney, rather than her husband's name, Kruzel. The case arose when the school board demanded that for insurance purposes she

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2. 67 Wis. 2d 138, 226 N.W.2d 458 (1975).