

12-27-2013

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

Circuit Court Case
No. 2012CF466; 2012CF229,
2012CF230

APPEAL FROM ORDER OF THE CIRCUIT COURT OF KENOSHA COUNTY
DATED JUNE 11, 2012, UPHOLDING THE CONSTITUTIONALITY OF
SECTION 970.038 OF THE WISCONSIN STATUTES, JUDGE ANTHONY
MILISAUKAS, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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Appellant, Charles E. Butts

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Sixth Amendment.	2, 3
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ISSUES PRESENTED FOR REVIEW

Whether Section 970.038 of the Wisconsin Statutes unconstitutionally deprives the defendant due process of law.

Answered by trial court and Court of Appeals: No

STATEMENT OF FACTS

Charles E. Butts is the defendant and currently incarcerated in the Kenosha County Detention Center awaiting trial on six (6) felony counts (27:1-2) as follows:

Count 1 - Sexual assault of a child under 16 years of age, persistent repeater.

Count 2 - Child enticement, persistent repeater.

Count 3 - Sexual assault of a child under 13 years age, persistent repeater.

Count 4 - Child enticement, persistent repeater.

Count 5 - Sexual assault of a child under 13 years of age, persistent repeater.

Count 6 - Sexual assault of a child under 13 years of age, persistent repeater.

The Criminal Complaint alleges that the conduct occurred in 2001 and 2002 (1:1-11). The complaint was filed April 27, 2012.

The defendant appeared in court on April 27, 2012 and bond was set at \$100,000 cash (3:1). The preliminary hearing was scheduled on May 3, 2012. At that hearing, the

defendant objected to the constitutionality of §970.038 of the Wisconsin Statutes and the court commissioner referred the matter to the circuit judge for a decision on the defense motion declaring §970.038 unconstitutional (31:4). Kenosha Circuit Judge Anthony Milisauskas was assigned to the case and on June 6, 2012 upheld the constitutionality of §970.038 of the Wisconsin Statutes (32:13-14). A Petition for Interlocutory Appeal was filed with the Court of Appeals pursuant to §808.03(2) of the Wisconsin Statutes and the Petition was granted. The Court of Appeals affirmed the trial court. State v. O'Brien et al, 2013 WI App 97, 349 Wis. 2d 667.

A petition for review was filed and granted on December 5, 2013.

ARGUMENT

SECTION 970.038 OF THE WISCONSIN STATUTES VIOLATES THE DEFENDANT'S RIGHT TO CONFRONTATION, CROSS-EXAMINATION AND COMPULSORY PROCESS ALL GUARANTEED IN THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEED BY THE UNITED STATES CONSTITUTION.

Section 970.038 of the Wisconsin Statutes in effect provides that complainant need not testify at a preliminary hearing but that a hearsay statement can be taken by

written report and read at a preliminary hearing and be the basis of a finding of probable cause. Appellant contends that this constitutes a violation of the due process of law guaranteed by the Wisconsin and Federal constitutions. In essence, a prosecutor could call anyone to read a report under §970.038 and the judge or court commissioner could make a finding that there is probable cause to believe that a felony was committed based upon that report (32-2:21). A cross-examination of the reader of the report would be meaningless (32-2:15). Defense counsel would be limited to challenge to the reader's ability to read.

A preliminary hearing, while a statutory right, is a critical state of the criminal justice process.

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial or preserve testimony favorable to the accused of a witness that does not appear at the trial. Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

A preliminary hearing is a statutory right. If the State requires a preliminary hearing, due process and the right to counsel are required. As Coleman v. Alabama makes very clear, counsel has a strong role at such a preliminary hearing, including the right to cross-examine witnesses. Section 970.038 of the Wisconsin Statutes deprives one of the right to cross-examine a witness as that hearsay statement is admitted without the complaining witness ever appearing in court. The reader of the report need not have any knowledge of the case. It makes it impossible for a judge or court commissioner to exercise the court's proper role at a preliminary examination to determine if there is a "plausible account" that the defendant committed a felony. State v. Williams, 198 Wis. 2d 516 (1996). The judge or commissioner at a preliminary hearing is to determine whether facts and reasonable inferences may be drawn to support a conclusion that the defendant probably committed a felony. State v. Koch, 175 Wis. 2d 684 (1993). The court is thus deprived of substantial evidence by the examination of hearsay reports under Section 970.038. This fails to protect the defendant's due process rights. What good is the right to counsel as Coleman v. Alabama, 399 U.S. 1 requires, if counsel is unable to effectively cross-

examine a witness? Is defense counsel to challenge the witness' ability to relate? A preliminary hearing court cannot guard against undue deprivations of the defendant's liberty by merely examining reports of the statements of complainant. State v. Kleaser, 2009 WI App. 43, 316 Wis. 2d 825, 2010 WI 88, 328 Wis. 2d 42.

This argument is further strengthened by the fact that a defendant may present evidence at a preliminary hearing by calling witnesses to rebut the plausibility of a witness' story and the probability that a felony is committed. The defendant has compulsory process to assure the appearance of witnesses and their relevant evidence. State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279.

The defendant's right to cross-examine witnesses at a preliminary hearing to test the plausibility of statements of the witness' account is deprived if the State is allowed to offer hearsay evidence with an officer reading the statement of the complainant. State v. White, 2008 WI App. 96, 312 Wis. 2d 799.

The preliminary hearing is one of historic importance in Wisconsin. It has long been celebrated as an essential part of the criminal justice system in Wisconsin. Section 970.038 of the Wisconsin Statutes is a radical change in

the administration of justice. In effect, it makes a mockery of the importance of the preliminary hearing as it only requires a reader without any personal knowledge to read the reports and the court is then to make a determination of probable cause. Cross-examination becomes a meaningless exercise as the reader need have no personal knowledge of any of the facts but only the ability to read. A preliminary hearing becomes meaningless and the determination of probable cause is made by the court listening to the reports. The court could read the report without a preliminary hearing and make a finding of probable cause thus eliminating the need for attorneys to appear in court. Section 970.038 of the Wisconsin Statutes undermines the importance of the preliminary hearing and should be declared unconstitutional as depriving the defendant the right of due process of law, confrontation and cross-examination of witnesses and compulsory process.

If the statute is upheld Preliminary Hearings in Wisconsin have no useful purpose and should be abolished by the Legislature as a waste of time.

CONCLUSION

For the reasons cited herein, the appellant requests the court to declare Section 970.038 of the Wisconsin

Statutes unconstitutional.

Dated this 26th day of December, 2013.

Respectfully submitted,

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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19 (8)(b) and (c) in that it is:

Typewritten (pica, 10 spaces per inch, mono font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides.

The length of the Brief is 7 pages.

Dated this 26th day of December, 2013.

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS.
§(RULE) 809.19 (12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § (RULE) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of December, 2013.

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CERTIFICATION RE APPENDIX

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains as a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of December, 2013.

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STATE OF WISCONSIN
I N S U P R E M E C O U R T

Appeal No. 2012 AP 1863 CR
2012 AP 1769 CR
2012 AP 1770 CR

STATE OF WISCONSIN,
Plaintiff-Respondent

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APPENDIX OF DEFENDANT-APPELLANT

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