STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN O'BRIEN,	Case No. 2012 AP 1769 CRLV
KATHLEEN O'BRIEN,	Case No. 2012 AP 1770 CRLV
and	
CHARLES E. BUTTS,	Case No. 2012 AP 1863 CRLV

Defendant-Petitioners.

Consolidated Appeal of Non-Final Orders from the Circuit Court of Walworth County, Judge John Race Presiding and the Circuit Court of Kenosha County, Judge Anthony Milisaukas Presiding

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NON-PARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

WISCONSIN

STATUTES & RULES

DISCUSSION

In creating WIS. STAT. § 970.038 and providing trial courts with discretion to base a finding of probable cause "in whole or in part" on hearsay, the legislature did not fundamentally change the hearing's purpose as an important check on the advancement of a felony case.

Hearsay has been permitted at preliminary examinations for some time. While trial courts now have greater latitude on which to base their finding of probable cause, the preliminary hearing retains its important purpose. However, the greater latitude has meant that, at least in some trial courts, the proceeding has lost much of its meaning. For when the state introduces a criminal complaint as the only evidence of probable cause and produces a witness with little or no personal knowledge of the facts alleged in the complaint, the protections inherent in the proceeding are rendered meaningless. Despite the statute's language, not all trial courts have followed this approach; some read the statute to still require a witness's personal knowledge of the events testified to. The latter approach to the hearing is consistent with both due process and the purpose of the hearing.

Amicii urge this Court to consider that the greater discretion afforded trial courts must be read in combination with a defendant's due process rights, the rights prescribed by statute as well as the purpose of the hearing. A perfunctory hearing may serve expedient goals, namely to process cases more quickly with less witnesses. But such an approach also lessens the trial court's important role as a neutral and detached magistrate who acts as a check on the power of the executive branch.

I. THE PRELIMINARY HEARING IS A MEANINGFUL PROCEEDING AT A CRITICAL STAGE OF A CRIMINAL CASE.

Permitting a trial court to rely "in whole or in part" on hearsay at a preliminary hearing did not alter the purpose which the preliminary hearing serves: to avoid a prosecution that is too hasty or improvident and to determine if there is a substantial factual basis for bringing the prosecution. ***State v. Williams***, 198 Wis. 2d 516, 527, 544 N.W.2d 406, 411 (1996); ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151, 155 (1984) (preliminary hearing is a screening device to assure that "the accused is not being prosecuted too hastily, improvidently, or maliciously and that there exists a substantial basis for bringing the prosecution"). Indeed, the Wisconsin Supreme Court recently repeated that this core purpose of the hearing retains its vitality. ***State v. Kleser***, 328 Wis. 2d 42, 68, 786 N.W.2d 144, 157 (2010). An accused may be bound over for trial only when the evidence presented at the preliminary hearing provides "probable cause to believe that a felony has been committed by the defendant." WIS. STAT. § 970.03(7). This standard means something.

But, "probable cause" means different things in different contexts and "probable cause" to bind an individual for trial is set at a higher level than "probable cause" to place a citizen in handcuffs, to arrest, or to search a person's home or bank records, or to file a criminal charge against that individual. "'[P]robable cause' does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999). "The degree of probable cause required for a bindover is greater than that required to support a complaint [but less than] a finding of guilt beyond a reasonable doubt." ***T.R.B. v. State***, 109 Wis. 2d 179, 188, 325 N.W.2d 329 (1982); ***Taylor v. State***, 55 Wis. 2d 168, 173, 197 N.W.2d 805 (1972) (noting that a preliminary hearing

"may require more by the way of evidence than other preliminary determinations of probable cause").

Moreover, due process must guarantee more than the right to a fair trial. "Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." ***Missouri v. Frye***, 132 S. Ct. 1399, 1407 (2012). Due process must be interpreted so as to guarantee fair pretrial procedures that provide for meaningful review of the charging decision and assess whether sufficient evidence exists to justify depriving the defendant of liberty and property interests pending trial.

Notwithstanding its statutory origin, "[a] preliminary hearing is a critical stage in the criminal process." ***State v. Schaefer***, 2008 WI 25, 308 Wis. 2d 279, 321-22, 746 N.W.2d 457; ***Coleman v. Alabama***, 399 U.S. 1, 10 (1970). Every defendant charged with a felony in Wisconsin is constitutionally entitled to the assistance of counsel at a preliminary hearing. ***Id.***, *at ¶ 84.*

If the right to counsel at a critical stage is to have meaning, then there must also exist a right to confront witnesses at a preliminary hearing, albeit within the framework of reliability and not with the goal of attacking credibility. *See* ***Wilson v. State***, 59 Wis. 2d 269, 208 N.W.2d 134 (1973). While our supreme court has noted "no constitutional right to confront adverse witnesses at a preliminary examination," ***Mitchell v. State***, 84 Wis. 2d 325, 336, 267 N.W.2d 349, 354 (1978), the Court's pronouncement is not as forceful as it appears for three reasons. First, the confrontation issue in ***Mitchell*** was not decisive—and, as the court noted, the defendant still had a statutory right to cross-examine witnesses called at the hearing.

Second, the purpose of the right to cross-examine a witness was not affected where the defendant had the chance to question the witness to

whom the key statements had been made. Though the statement testified to by the witness was hearsay, the reporting witness could be adequately questioned about the statement's plausibility. ***State v. Padilla***, 110 Wis. 2d 414, 422-424, 329 N.W.2d 263, 268-269 (Ct. App. 1982).

But unlike the complainant's mother who testified to statements made by her daughter in ***Padilla***, the same cannot be said of the defendants' ability to cross-examine the only witness called by the state at the preliminary hearing in the O'Brien case.[1] There, the police investigator who testified had scant personal knowledge of the allegations made against the defendants. *See* Brief of Defendants-Appellants at 4 ("When the witness was permitted to answer, she was frequently unable to recall any facts not found in the criminal complaint").

Third, ***Gerstein v. Pugh***, 420 U.S. 103 (1975), cited by ***Mitchell*** as the source of there being no constitutional right to confrontation at a preliminary hearing, did not reach this conclusion as decisively as the court in ***Mitchell*** suggested. ***Mitchell***, 84 Wis. 2d at 336. In ***Gerstein***, the Court noted that "adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment." Indeed, with almost equal force, the Court noted the importance of a defendant's ability to cross-examine a witness at the preliminary examination. When a pretrial hearing takes the form of a preliminary hearing and adversary procedures are used, "[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination." 420 U.S. at 120.

In the end, the gloss that has been given to ***Gerstein*** through ***Mitchell*** must be examined in light of a defendant's due process right to

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[1] *See* Case Nos. 2012 AP 1769 and 1770 CRLV.

meaningful fair pretrial procedures that provide for a meaningful review of the charging decision. Reading ***Gerstein*** and progeny to bar a meaningful opportunity to assess the evidence used to initiate criminal proceedings offends due process and misses the purpose of the hearing.

Some trial courts since the passage of § 970.038 seem to have read ***Gerstein-Mitchell-Padilla*** broadly—to limit the need for presentation of evidence other than hearsay. And others, more narrowly. Anecdotally, *amicii* are aware of trial courts that, like in O'Brien, permit the state to introduce the criminal complaint as an exhibit as the basis for the trial court's determination of bind over. The ability of defense counsel to challenge the plausibility of the witness's testimony is effectively naught. Nor, in those cases, can the trial court effectively supervise the decisions of the district attorney to file felony charges. Other courts, by contrast, have required more of the state. There, still consistent with ***Padilla***, the trial courts have required the state to call witnesses with personal knowledge of the declarant's statement. Attached to amicii's brief is a summary of anecdotes which show the way in which § 970.038 has been interpreted by Wisconsin trial courts. *See* Appendix. The latter approach, *amicii* believe, is the only interpretation consistent with due process and purpose of preliminary examination.

III. A TRIAL COURT SHOULD CONSIDER PRIVILEGES AND DEFENSES WHEN DETERMINING WHETHER TO BIND OVER FOR TRIAL.

A trial court considers plain Wisconsin law in deciding whether a defendant probably committed a felony. This does not mean, however, that the trial court cannot consider information that could tend to show that the accused's acts were privileged. Nothing in § 970.038 prevents a trial court from considering the provisions of

Wisconsin law that relate to privilege. The restricted view of the purpose of the preliminary examination advanced by the state would bar consideration of such relevant information.[2] A trial court's consideration of evidence that tends to show the accused's acts to have been privileged are consistent with the purpose of the preliminary examination, as an example makes clear.

Wisconsin law generally makes it a crime to cause bodily injury to another person. Imagine that a homeowner awakens to an intruder in her home and, when the intruder turns toward the homeowner and points a firearm at her, the homeowner shoots and kills the intruder. Under a narrow view of the purpose of the preliminary examination the trial court considers only whether there is probable cause to believe that a felony was probably committed by the homeowner. The court cannot consider application of WIS. STAT. § 939.48(1m)(ar) (the so-called "Castle Doctrine"). Too, the kind of weapon used or the nature of the threat would not be relevant. All that matters is that the homeowner killed another person. That view of what § 970.038 requires is too pinched.

Where Wisconsin law employs two statutes to define the parameters of lawful conduct, both—not just one—must be considered. Moreover, consideration of such evidence furthers the purposes of the preliminary examination. That affirmative defenses are not elements of the crime and thus need not be addressed at the preliminary examination ignores reality. Absent consideration of privileges at the preliminary examination parents may be brought into court, labeled child abusers and forced to endure lengthy litigation until the fact that

[2] *See* Brief of Plaintiff-Respondent at 33-34.

their conduct was reasonable discipline and, therefore, legally privileged, may be addressed at jury trial.[3]

Where there is a reasonable inference that pain was inflicted as a result of reasonable parental discipline, a trial court should permit a defendant to inquire into such facts at a preliminary hearing. To do so serves every one of the functions of preliminary hearing: it prevents improvident and oppressive prosecution; it protects the person charged from open and public accusations of crime; it avoids both for the defendant and the public the expense of a public trial, and it saves the defendant from humiliation and anxiety involved in public prosecution. It also allows the court to discover whether there are substantial grounds upon which a prosecution may be based. And, finally, permitting inquiry to legal justification provides notice to the accused of where his conduct violated the law.

Relatedly, CH. 970 invites a defendant to raise and a court to consider facts that negate or mitigate an offense at that stage. By statute, a defendant may cross-examine witnesses at the preliminary hearing. WIS. STAT. § 970.03(5). There is little point to that other than to provide an opportunity to establish defenses or mitigation, especially because the purpose of a preliminary hearing is *not* discovery. ***Bailey v. State***, 65 Wis. 2d 331, 344, 222 N.W.2d 871, 878 (1974); ***State v. Schaefer***, 2008 WI 25, ¶¶26-40, 308 Wis. 2d 279, 746 N.W.2d 457. The statutes implicitly suggest, then, that a defendant may demonstrate a legal defense or mitigation at the preliminary hearing, and that a court ought consider such evidence.

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[3] More concretely, in O'Brien, the parental discipline privilege (*see* § 939.45(5)(b)) is an important aspect of intentional physical abuse of a child.

Even more, a defendant may call his own witnesses at the preliminary hearing. WIS. STAT. § 970.03(5).[4] That is a right even harder to separate from presenting a defense (complete or partial) at the preliminary hearing. No court has ever held that a defendant may not compel the attendance of witnesses at the preliminary hearing; indeed, WIS. STAT. § 970.03(5) specifically permits a defendant to call witnesses. In any case, *amicii* note the testimony of the witness must be relevant.[5] WIS. STAT. § 885.01, in turn, authorizes the production of witnesses and their products of lawful instruments in "any active *matter or proceeding pending* before any person authorized to take testimony in the state."

The opportunity to present a full or partial defense becomes even more clear against the statutory directive that a judge may conclude that the state proved only a misdemeanor at the preliminary hearing, and amend the charge accordingly. WIS. STAT. § 970.03(8). A preliminary hearing is available only when the state charges a felony in the criminal complaint, § 970.03(1)(c), so a judicial conclusion that the evidence shows at most a misdemeanor necessarily encompasses cases in which the defendant is able to demonstrate mitigation of the offense or a

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[4] WIS. STAT. § 970.038 does not deny a defendant's right to call witnesses at a preliminary hearing. The statute must be interpreted in a manner consistent with the defendant's statutory right to call witnesses. The "rules of judicial construction require [a court] to consider statutes pertaining to the same subject matter together." ***Capoun Revocable Trust v. Ansari***, 234 Wis. 2d 335, 344, 610 N.W.2d 129 (Ct. App. 2000).

[5] While the Court in ***Schaefer*** found "no compulsory process right to subpoena police investigation reports and non-privileged materials before the preliminary examination," 308 Wis. 2d at 315, the opinion does not limit a defendant's ability to subpoena witnesses to such a hearing. Rather, the Court "decline[d] to expand a criminal defendant's compulsory process rights to encompass a right to subpoena police reports and other non-privileged investigatory materials for examination and copying in anticipation of a preliminary hearing." *Id.*, at 318.

partial defense (reducing the crime from a felony to a misdemeanor) at the preliminary hearing. ***Schaefer***, 2008 WI 25 at ¶35.

Finally, Wisconsin decisions yet leave room for a preliminary hearing court to consider facts and circumstances demonstrating that further criminal proceedings are not warranted, even within the limited purposes of that hearing. As our supreme court has refined the purpose of a preliminary hearing over the last four decades, still it has retained the basic function of the preliminary hearing. "The independent screening function of the preliminary examination," the supreme court explained, "serves as a check on the prosecutorial power of the executive branch." ***Id.***, at ¶33.

IV. REVERSAL OF THE TRIAL COURTS' ORDERS WILL NOT RESULT IN SUBSTANTIAL BURDEN ON TRIAL COURTS.

If § 970.038 violates a defendant's rights, it does not follow that every case that has been bound over for trial since passage of 2011 Act 285, is constitutionally infirm. Rather, the class of cases to which the decision would give a more broad reading to the right to preliminary examination is small, and fairly so. Mainly, such a decision would apply prospectively. But that is a case-by-case determination applicable to a limited number of cases. *See* ***Adams v. Illinois***, 405 U.S. 278, 285 (1972).

Amicii does not doubt that "to void hundreds of arraignments and to set aside the jurisdiction which had been assumed by criminal court in those felony cases would place a substantial burden upon courts of justice and the penal institutions of the state. It would adversely affect the administration of justice." ***State ex rel. Perry v. Wolke***, 71 Wis. 2d 100, 110, 237 N.W.2d 678 (1976). But efficiency alone is not reason enough to limit the application of any decision.

So, while the preliminary examination is a critical stage, the limits on counsel's ability to cross-examine a witness or to call a witness at that hearing "involves less danger to 'the integrity of the truth-determining process at trial" than the omission of counsel at the trial itself or on appeal." ***Adams***, 405 U.S. at 282. As a result, complete retroactivity would not be required. This court may follow ***Wolke*** and limit application of this decision to those cases at bar and those charged where the preliminary examination will take place after the court's mandate. *See* ***Wolke***, 71 Wis. 2d at 111.

CONCLUSION

Simplifying judicial review of probable cause should not reduce the meaningful role of the preliminary examination. If the purpose of the hearing is to act as a check on the executive, then permitting trial courts to base a finding of probable cause on a narrow reading of § 970.038, is to render the preliminary hearing perfunctory and meaningless within the larger function given to this critical stage of the proceedings. ***State v. Schaefer***, 2008 WI 25, ¶33 (The independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive branch. An accused has the option to assure that the hearing is scheduled expeditiously so that he may be discharged quickly if the government cannot justify its right to go forward).

In order to continue the important role of trial courts at this critical stage, this Court should require the state, if it seeks to establish probable cause based on hearsay alone, to call witnesses who have personal knowledge of the declarant's statements. Courts should not permit bind over on the testimony of a witness who relies on statements contained in a criminal complaint.

Dated this 1st day of February , 2013.

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RULE 809.19(8)(D) CERTIFICATION

This brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,999 words.

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RULE 809.19(12)(F) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the paper copy of the brief.

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Marcus J. Berghahn

CERTIFICATION OF 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 WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 decisions 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 portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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INDEX TO APPENDIX