STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 12AP1769-CR and 12AP 1770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARTIN O'BRIEN, and
KATHLEEN O'BRIEN,

Defendant-Appellants.

REPLY BRIEF OF DEFENDANT-APPELLANTS

On Appeal of a Non-final Order Entered in the Circuit Court
for Walworth County, the Honorable John Race Presiding

Respectfully Submitted,

BUTING, WILLIAMS & STILLING, S.C.
Kathleen B. Stilling, SB #1002998
Jerome F. Buting, SB #1002856

Attorneys for Martin O'Brien

Address:
400 N. Executive Drive
Suite 205
Brookfield, WI 53005
(262) 821-0999

LAW OFFICE OF
PAMELA S. MOORSHEAD, S.C.
Pamela Moorshead, SB # 1017490

Attorney for Kathleen O'Brien

Address:
6165 N. Green Bay Road
Glendale, WI 53209
(414) 247-8600

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

I. The Use of Hearsay at the Preliminary Hearing Violated the O'Briens' Constitutional Rights.

A. Confrontation.

The Sixth Amendment expressly applies in "all criminal *prosecutions*," not just at trial. The Sixth Amendment right to the effective assistance of counsel attaches well before trial, indeed at any "critical stage." *See United States v. Wade*, 388 U.S. 218, 226-27 (1967). This guarantee is not limited to procedures directly affecting the actual determination of guilt. *Kimmelman v. Morrison*, 477 U.S. 365, 379, 106 S.Ct. 2574, 2586 (1986); *Lafler v. Cooper*, __ U.S. __, 132 S.Ct. 1376, 1388 (1012). Yet, most courts struggle in applying the Sixth Amendment rights of confrontation and compulsory process to criminal proceedings before trial. The case law is poorly developed and authorities often lack support or overstate the Supreme Court's prior rulings.

For example, the State twice quotes Professor LaFave's statement that the Supreme Court has "long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment." LaFave cites only one very old Supreme Court case, *Goldsby v. U.S.*, 160 U.S. 70, 16 S.Ct. 216 (1895), which does not support his proposition. The right to confrontation at a preliminary hearing was never at issue in *Goldsby* because the defendant was indicted by grand jury and had no preliminary hearing. 160 U.S. at 72-74.

In other cases not involving preliminary hearings, the Supreme Court has referred to the right of confrontation as "basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). But, contrary to the quotation in LaFave's treatise, the Supreme Court has *never* decided whether the right to confrontation applies to a preliminary hearing, and there is a split in state courts. *See, e.g., State v. Timmerman*, 218 P.3d 590, 593 (Utah 2009) (Sixth Amendment confrontation does not apply); *cf. State v. Massengill*, 99 N.M. 283, 657 P.2d 139, 140 (Ct. App.1983) (confrontation right extends to preliminary examinations).

The Wisconsin Supreme Court's discussion in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), about the constitutional right to confrontation

at a preliminary hearing does not control here because it was *dicta*[1] based on a misreading of *Gerstein v. Pugh*. Moreover, the legal landscape of the confrontation right changed dramatically after *Crawford v. Washington*, 541 U.S. 36 (2004), which established that the Confrontation Clause's ultimate goal was to guarantee a defendant's right to ensure the reliability of testimonial evidence against him through a specific process: confrontation. *Id.* at 61.

The State dismisses *Crawford*, because it did not specifically address confrontation in a preliminary hearing. It is true hearsay at a preliminary hearing was not an issue in *Crawford*, but neither were "surrogate" forensic lab certifications, yet the Court recently expanded *Crawford's* analysis to apply to them. *Bullcoming v. New Mexico*, __ U.S. __, 131 S.Ct. 2705 (2011). Only a few courts have addressed the question whether *Crawford* applies at preliminary hearings, thus far in the negative. *See Sheriff v. Witzenburg*, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004 (2006); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010); *State v. Timmerman*, 218 P.3d at 593 (Utah 2009). But so far, neither the United States Supreme Court nor any Wisconsin appellate court has yet decided whether *Crawford* applies to preliminary examinations. The Wisconsin Supreme Court recognized that "[w]ith the *Crawford* decision, a new day has dawned for Confrontation Clause jurisprudence." *State v. Stuart*, 2005 WI 47, ¶ 26, 279 Wis. 2d 659, 671, 695 N.W.2d 259, 265, quoting *State v. Hale*, 277 Wis.2d 593, ¶ 52, 691 N.W.2d 637. The contours of *Crawford* are still evolving.

The State relies heavily on *Peterson*, a civil rights case challenging the California statutory and constitutional amendments which permitted hearsay at preliminary hearings. The *Peterson* court relied largely on *Whitman v. Superior Court*, 54 Cal.3d 1063, 820 P.2d 262, 265 (1991). In *Whitman*, the California Supreme Court concluded that California's scheme did not violate the confrontation clause. But California's law allows hearsay at a preliminary hearing only through a properly trained investigating officer. California courts interpret that limitation to preclude double or triple hearsay: "[t]he testifying officer, however, must not be a mere reader but must have sufficient

---

[1]Courts have inconsistently defined *dicta*. *See Zarder v. Humana Ins. Co*, 2010 WI 35, ¶ 52, 324 Wis. 2d 325, 782 N.W.2d 682. The State cites only one line of cases. But another line defines *dicta* more broadly as "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *Id.*, at n.19. The O'Briens suggest that if this Court believes *Mitchell* to be binding but outdated, the Court should certify the question to the Supreme Court in light of recent U.S. Supreme Court jurisprudence. *See Zarder* at ¶ 55.

knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." *Whitman*, 820 P.2d at 267. *See also*, *People v. Wimberly*, 5 Cal. App. 4th 439, 445-46, 6 Cal.Rptr.2d 800 (Cal. App.2nd Dist 7 1992) ("testifying officer, who has *not* interviewed the declarant, will inevitably be 'unable to answer potentially significant questions regarding the ... circumstances' under which the statement was made"). *Whitman* also noted that admitting multiple hearsay would raise federal constitutional concerns because it "would deprive the magistrate and the defendant of the opportunity to explore the reliability of the hearsay statement." 54 Cal.3d at 1074, 1082.

Unlike California's law, § 970.038, contains no requirement that admissible hearsay must come from the investigating officer. In the O'Briens' case, the officer interviewed only one of the witnesses, the 17-year-old S.M.O. (APP. 166), yet she was allowed to testify to hearsay statements from four other children. *(Id.* at 167; APP 105-111). On cross-examination she was frequently unable to recall any facts not in the complaint, which she admitted did not contain verbatim accounts and had significant factual gaps. (APP 167-68, 170, 174-75, 179, 182-84, 189). Thus defense counsel was unable to explore either the reliability or plausibility of the hearsay statements. And unlike California's law, § 970.038 provides hearsay "is admissible," at a preliminary hearing without any prohibition against multiple hearsay to ensure reliability.

The State contends that two Court of Appeals decisions are controlling. State's Brief at 7-11. The O'Briens disagree.

In *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982), the court allowed hearsay testimony from a young child's mother at the preliminary hearing because the testimony fit a firmly rooted hearsay exception for excited utterance. *Id.* at 418-22. By contrast, the hearsay allowed in this case fit no historically rooted exception, and had no particular indicia of reliability.

Further, the *Padilla* court did not analyze whether the *constitutional* right to confrontation should have barred the hearsay, because it deemed the question foreclosed by *Mitchell*. *Id.* at 422. Instead, the court analyzed whether the hearsay violated the defendant's *statutory* right to confrontation, concluding that "the statute permits cross-examination of only those people actually called to the stand." *Id.* at 424. The mother "could have been and was tested on the stand" to determine whether she was in a position to hear the

child's excited utterance, whether she had a good memory of it, and "whether she was relating it accurately." *Id.* In stark contrast, the O'Briens' counsel were repeatedly thwarted in their efforts to challenge plausibility because the detective had no independent recall of facts not contained in the complaint, which contained only summaries of S.M.O.'s allegations.

State v. Oliver, 161 Wis. 2d 140, 467 N.W.2d 211 (Ct. App. 1991), is similarly distinguishable. In *Oliver*, the Court of Appeals held a four year old child's statement to his father that the defendant hit him was admissible at the preliminary hearing under the residual hearsay exception. *Id.* at 143-48. The Court presumed, without citing authority, that there was no constitutional right to confrontation at the preliminary hearing. *Id.* at 146. The court then held the statutory right to confrontation was satisfied because the father was available for cross-examination about physical injuries supporting the allegation as well as the recency of the child's report (three days after the alleged incident). *Id.* at 148-49. In contrast, the accusations made in this case were broadly scattered over an eight year period of time, and the detective had faulty memories and no personal knowledge of any injuries.

B. Effective Assistance of Counsel

The accused has the right to require the prosecution's case at every stage to survive the "crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

The State argues under *State v. Schaefer* 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, the *Strickland* standard applies whenever a defendant claims that "a procedural rule impairs the effective assistance of counsel." State's Brief at 21. This overstates the Court's holding. The Court rejected Schaefer's position that he required access before the hearing to police reports to perform effectively at the hearing, and refused to deem counsel's failure to subpoena police reports *per se* ineffective. The court found that, given the limited scope of a preliminary hearing, the information counsel could obtain independently was sufficient to enable counsel to effectively rebut "the plausibility of the complainant's statement and probable cause." *Id*. at ¶91-92. Therefore, a *per se* rule was not required.

But some circumstances are so inherently prejudicial that the defendant need not prove prejudice. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111 (1974) (no specific showing of prejudice required where defendant had been "denied the right of effective cross-examination"). Thus, prejudice is

presumed when counsel has been prevented from assisting the accused during a critical stage of the proceeding. *Cronic*, 466 U.S. at 659, n. 25. A preliminary hearing is undoubtedly a "critical stage." When, as here, a procedural rule prevents counsel from effectively assisting the accused by subjecting the prosecution to "meaningful adversary testing," prejudice should be presumed. *Strickland* does not apply.

C. Compulsory Process

The State also claims that *Schaefer* held the constitutional right to compulsory process does not apply to preliminary examinations. State's Brief at 25-26. Again, the State misstates the holding in *Schaefer*, which was limited to the production of evidence *before* the preliminary examination, not the right to compulsory process *at* the hearing. Indeed, *Schaefer* acknowledged a criminal defendant has a compulsory process right "at a preliminary stage of the criminal proceedings," but noted that it is "subject to reasonable restrictions." 308 Wis. 2d 279, ¶ 75.

II. The Court Construed §973.038 to Nullify the Preliminary Hearing.

The prosecutor presented a bold view of the new statute under which the judge must credit any hearsay the state offers, view it in the "light most favorable to the State," and order bindover if it is "consistent with guilt." (App.146-47). The judge did not expressly accept or reject this notion, leading to the State's contention now that the judge did not construe the statute but simply applied established law when he excluded the defense witness and limited cross-examination. But he made decisions about what the new statute required him to do and did not concern himself with the completeness or reliability of the hearsay. The defendants' right to cross examine and call witnesses were so limited as to be nearly non-existent. Ultimately, he viewed the statute as leading to a hearing he called "perfunctory." (App.238).

If the manner in which the court applied the statute is upheld, the result is the reduction of the preliminary hearing to a nullity, an absurd result that this Court must presume the legislature did not intend.

A. Exclusion of the Witness.

The State characterizes the court's exclusion of S.M.O.'s testimony as a simple matter of relevance. But although the court and the prosecutor spoke

of relevance, this was not about relevance at all. Most of the hearsay introduced at the hearing came from S.M.O. Anything he would have said about his account of the alleged abuse was *relevant* to the plausibility of that account.

The court's and prosecutor's repeated calls for an offer of proof were not demands for a showing of relevance, but demands that the defense state precisely what S.M.O. would say, which defense counsel admitted was not possible. Further, they were demands for a showing that what S.M.O. would say would "defeat probable cause." (App.204). The court's requirement was summarized as follows:

> I still want to know what it is that you know that S.M.O. will say when he gets on this witness stand that would affect the plausibility of Officer Domino.

(App. 215).

The requirement that the defense know precisely what the principal fact-witness will say, and show how it will defeat probable cause as a prerequisite to a finding of relevance is all but a blanket prohibition on calling defense witnesses. The defense will almost never know precisely what the witness will say (even when it is clear that whatever it is, it will be relevant). In most cases the defense has no discovery before the hearing. *Schaefer*, 2008 WI 25, ¶ 57. To place such burdens on the right to call witnesses is to effectively deny that right altogether.

Furthermore, the court's demands for a showing of what it called relevance were distorted when the court narrowed the scope of the inquiry to only what S.M.O. would say that would destroy the officer's account of hearing the hearsay. The court repeatedly demanded to know how S.M.O.'s testimony would establish that Officer Domino did not testify plausibly. (App.208, 210-211, 215).

The State protests that the judge did not so narrow the inquiry because when the judge referred to the plausibility of Officer Domino's testimony, this included the plausibility of the hearsay statements the officer testified to. Some of the judge's comments are unclear and could be interpreted that way, if we ignore this one:

> So are you telling us that you - you - by examining S.M.O. are you going to find, um that Ms. Domino made all this up or that -

(App.210).

As a fallback, the State argues that if the judge did so narrow the hearing's scope, that was just fine, citing *Padilla*. 110 Wis.2d at 424. To the extent that *Padilla* shifts the focus of the preliminary hearing from probable cause that the defendant committed a felony to probable cause that the testifying witness heard hearsay, it was wrongly decided - a matter that cannot be pursued before this Court.

In any event, *Padilla*, is distinguishable. In *Padilla*, hearsay was admitted under the well-established excited utterance exception. The court in *Padilla* never contemplated the situation under § 970.038 where any hearsay is admissible regardless of whether it fits any established exception. Unlike the O'Briens, Padilla was allowed to cross-examine the witness to elicit a more complete account of the hearsay, to determine whether the mother "was relating it accurately." 110 Wis. 2d at 424. Nor did Padilla attempt to call any witnesses himself, so he was not prevented from doing so. The *Padilla* court was simply never called upon to answer the questions raised by this case.

As interpreted by the state prosecutor in the O'Briens' case, all the State needs for a bindover is to submit the criminal complaint as an exhibit, and then rest. The defense could call no witnesses without showing that the witness would "defeat" the probable cause established in the criminal complaint. The preliminary hearing would thus provide no check on the prosecutor's power. The Supreme Court rejected the government's argument in *Gerstein v. Pugh*, 420 U.S. 103, 117-119 (1975), that the prosecutor's information was sufficient under the Fourth Amendment to allow the arrest and detention of the accused without any judicial review of probable cause. Likewise, this Court should reject the State's attempt to nullify the preliminary hearing by the unfettered use of hearsay and the constriction of the right to cross-examine and present witnesses.

The only reasonable interpretation that reconciles §970.038 with §970.03(5) is that the scheme relieves the State of the requirement of presenting first-hand testimony, but does not prevent the defense from doing so, provided that, as here, the defense does not intend to attack the witness' credibility.

B. Limitations on Cross-Examination.

Judge Race did not expressly interpret the new statute to limit cross-examination, but he implicitly adopted the prosecutor's view that once the hearsay account was in the record, further inquiry was essentially foreclosed.

An example is the court's treatment of the attempt to cross-examine about the size of the piece of wood used to strike the plastic bin. This is relevant to the plausibility of the child's hearsay statement that he was injured. Nonetheless, the court shut down cross examination on this point.

The State says that size didn't matter because the complaint described the wood as a "log," which rendered the account of the injury unquestionably plausible. This was not the court's reasoning. Whether it is called a "stick" or a "log" does not answer the question of size. The prosecutor's argument that carried the day was not that a "log" of whatever size would have been sufficient to cause injury. Her argument was that "the size of the stick does not defeat probable cause" because the complaint said the child said he was injured, foreclosing any further inquiry. It was when the prosecutor reminded the judge of *this* that her objection was sustained. (App. 188). Further, the judge wrongly agreed that the question went to credibility.

This, added to the Judge's erroneous treatment of any question relating to information contained in the "discovery" materials as improper "discovery," (App. 20, 22, 28, 41) led to the near total frustration of the defendants' attempts to exercise their right to cross-examination.

CONCLUSION

This Court should reverse the trial court’s decisions denying the defendant’s motions to preclude hearsay and granting the State’s motion to quash, vacate the bindover and remand for a new preliminary examination.

Dated at Brookfield, Wisconsin, this 7th day of February, 2013.

Respectfully Submitted,

BUTING, WILLIAMS & STILLING, S.C.

s/Kathleen B. Stilling
Kathleen B. Stilling, SB #1002998
Jerome F. Buting, SB #1002856

Attorneys for Martin O'Brien

Address:
400 N. Executive Drive
Suite 205
Brookfield, WI 53005
(262) 821-0999

LAW OFFICE OF
PAMELA S. MOORSHEAD, S.C.

_____
Pamela Moorshead, SB # 1017490

Attorney for Kathleen O'Brien

Address:
6165 N. Green Bay Road
Glendale, WI 53209
(414) 247-8600

Attorneys for Defendants-Petitioners

CERTIFICATION

I hereby certify that this Document conforms to the rules contained in § 809.50 (1) for a petition and memorandum produced with a proportional serif font. The length of this document is 3000.

Dated this 7th day of February, 2013.

s/ Kathleen B. Stilling
Kathleen B. Stilling
State Bar No. 1002998
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 7th day of February, 2013.

s/Kathleen B. Stilling
Kathleen B. Stilling

CERTIFICATION OF FILING BY FIRST CLASS MAIL

I hereby certify that I am filing this brief on today's date by placing ten copies in a package addressed to:

Clerk, Wisconsin Court of Appeals, District II
Post Office Box 1688
Madison, WI 53701-1688

and timely delivering it to the U.S. Post Office to be placed in today's First Class Mail. (Rule) § 809.80 (3)(b) (4), Wis. Stats.

Dated this 7th day of February, 2013.

s/Kathleen B. Stilling
Kathleen B. Stilling
State Bar No. 1002998