STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014 AP 365-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. **Brown County Case No. 2013 CF 165**

DAVID E. HULL.

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HON. KENDALL M. KELLEY, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Attorney Rick B. Meier
State Bar # 1019531

Ellis Street Law Office
208 Ellis Street (Upper)
P.O. Box 215
Kewaunee, WI 54216
Phone (920) 606-7166
Facsimile (920) 388-2323
Email: rickbmeier@yahoo.com

Attorney for David E. Hull
Defendant-Appellant

TABLE OF CONTENTS

CASES:

STATUTES:

CONSTITUTION:

STATEMENT OF ISSUES

1. Did the application of Wis. Stat. § 970.038 to this case violate the federal constitution's prohibitions against *ex post facto* laws where the alleged crime took place over a year prior to the enactment and effective date of the new hearsay rule?

   The circuit court answered "No." See R. 30, Decision and Order, App. at 101, 103-105. The Wisconsin Supreme Court's recent decision in *O'Brien* does not address this issue. See *State v. O'Brien*, 2014 WI 54, 2014 Wisc. LEXIS 463.

2. Did the court commissioner err by terminating the preliminary hearing prior to allowing Hull to subpoena the alleged victim to testify thereby violating Hull's statutory right under Wis. Stat. § 970.03(5) to cross-exam witnesses against him, to call witness and present evidence on his own behalf, and to test the plausibility of the state's probable cause showing?

   The circuit court answered "No." R. 30; App. at 105-107.

STATEMENT OF FACTS

Hull is charged with first-degree sexual assault of a child (SJH, DOB 10/21/1996) with the use of force, and second degree sexual assault of the same alleged victim. R. 2 (criminal complaint); App. at 108. Hull faces a mandatory minimum sentence of twenty five years of initial incarceration if convicted. *Id.*

SJH claims that in February, 2011, she was forcibly sexually assaulted by Hull in a hotel room while her father was in the same room, and sleeping in the "next bed." She claims she may have been drugged. App. 109. See also SJH's written statement (R. 13); App. at 118-119.

SJH then waited until January, 2012, to report that she had been sexually assaulted. R. 13; App. at 109. The state then did not file a criminal complaint until February, 2013. *Id.* In the meantime, Wis. Stat. § 970.038, which allows hearsay evidence to be admitted at preliminary hearings, was enacted on April 12, 2012, and became effective on April 27, 2012. See 2011 Wis. Act. 285, and Wis. Stat. § 991.11.

Hull subpoenaed (R. 26) SJH to the first scheduled preliminary hearing in anticipation that the state would attempt to rely upon hearsay evidence to obtain a bind over. However, the preliminary hearing could not be held because SJH was in the hospital as a result of a suicide attempt. R. 39 at 2.

Subsequently, the state filed a "Motion To Quash Subpoena." R. 8. The gist of the state's motion was that the defense was calling SJH for "discovery." *Id.* The state also posited that requiring SJH to testify would cause her trauma, and "...re-victimization." R. 8 at 2; R. 40 at 4. The defense filed a brief in opposition thereto raising several constitutional challenges to Wis. Stat. § 970.038, and an addendum raising an *ex post facto* challenge to the application of Wis. Stat. § 970.038 to this case.[1] R. 9 & 10.

At a hearing scheduled to address these issues the court commissioner seemed to believe that he could stop a preliminary hearing without allowing the defense to call witnesses once the state had made its showing of probable cause. R. 40 at 12; App. at 111. The court commissioner also indicated that he would need an offer of proof before allowing the defense to call a witness. R. 40 at 22; App. at

---

[1] The Wisconsin Supreme Court has now ruled that Wis. Stat. § 970.038 is constitutional, thereby resolving all but the *ex post facto* claims made by Hull in this case. *State v. O'Brien*, 2014 WI 54, 2014 Wisc. LEXIS 463. Thus, only Hull's *ex post facto* claim remains to be determined by this court.

113. Trial counsel asked whether the court commissioner was finding that the victim's testimony was irrelevant? The court commissioner responded that: "It's duplicative for the determination." R. 40 at 23. App. at 114.

The court commissioner determined that at the next hearing he would allow Hull to request an adjournment to subpoena a witness if Hull could make "some showing" of a need for another witness. R. 40 at 26; App. at 117.[2]

At the outset of the preliminary hearing the court commissioner ruled that there was no *ex post facto* violation because § 970.038 does not alter the rules of evidence required for conviction. R. 41 at 5-6; App. at 123-24.

The state then called as its only witness Detective Bradley Linzmeier of the Green Bay Police Department. R. 41 at 6; App. at 124 following. Detective Linzmeier had never spoken to SJH. R. 41 at 18, App. at 137. Linzmeier testified that he read SJH's statement, which was obtained by an Ashwaubenon police officer. He testified that the investigation initially started in Ashwaubenon as there was some "...misunderstanding of exactly where the incident took place." R. 41 at 7; App. at 125.

In addition to his constitutional and hearsay objections, Hull objected to the admission of the written statement on the grounds that under Wis. Stats. § 906.02, the officer had no personal knowledge of SJH's written statement (R. 13) or that she signed it. R. 41 at 10-11. App. at 128-29. SJH's written statement (R. 13) is in the Appendix at 118-19.

---

[2] The court commissioner ultimately found that § 970.038 is constitutional and that he would allow ".... the state to proceed with presenting hearsay testimony." R. 40 at 21-2; App. at 112-13.

Det. Linzmeier testified that he interviewed Hull, and that Hull denied SJH's allegations. R. 41 at 14; App. at 132.

The defense offered into evidence a letter (R. 15, App. at 149), from its investigator. R. 41 at 21-2. The letter was admitted into evidence. R. 41 at 30. This letter indicates that SJH's mother refused to allow a defense investigator to interview SJH. R. 15; App. at 149.

At the conclusion of this hearing it was determined that the matter would be continued to allow Hull to call SJH's father as a witness. The court commissioner stated that he would determine whether a further hearing would be scheduled to allow Hull to call SJH as a witness. R. 41 at 29-30; App. at 147-48.

At the continued preliminary hearing, SJH's father was asked if he believed he was so intoxicated that he would have slept as his daughter screamed that she was being raped? The father testified that: "I can't believe that I would have, no." R. 42 at 12. He testified that his daughter did not tell him that Hull touched her, but she did tell him that Hull tried to wake her up. R. 42 at 14.

At the conclusion of the father's testimony Hull requested that the matter be continued to allow him to call SJH as a witness. R. 42 at 20; App. at 150. The court commissioner ruled that SJH's testimony was no longer relevant, and held that:

> So, I mean, I have heard enough evidence in this case to determine, I guess, for the probable cause standard that I have to find here today, that there is probable cause to believe that Mr. Hull committed a felony offense...So I will bind him over for trial...

R. 42 at 24; App. at 154.

After the preliminary hearings, but prior to arraignment, Hull filed a Motion to Dismiss the Information raising all of his previous objections and constitutional claims. R. 23. After hearing oral arguments (R. 44), and after the issues were briefed by both parties, the circuit court entered a written order denying the Motion to Dismiss. R. 30; App. at 101.

The circuit court ruled that there was no *ex post facto* violation because the new hearsay statute does not alter any rule of evidence at trial, and because preliminary hearings are a statutory creation the only purpose of which is for the state to establish probable cause. App. at 103-05.

The circuit court held that the court commissioner correctly held that Hull could not subpoena SJH because her testimony was not relevant to plausibility but instead would amount to discovery. App. at 105-07.

I. THE APPLICATION OF § 970.038 TO THIS CASE VIOLATES THE FEDERAL CONSTITUTION'S PROHIBITION AGAINST *EX POST FACTO LAWS.*

The defendants in *State v. O'Brien* did not raise an *ex post facto* challenge to the application of Wis. Stat. § 970.038 to their case despite the fact that the criminal investigation against the two O'Brien defendants began in 2011. *State v. O'Brien*, 2013 WI App. 97, ¶ 6, 349 Wis. 2d 667, 836 N.W.2d 840, 2013 Wisc. App. LEXIS 586. The Wisconsin Supreme Court's recent decision in *O'Brien* does not address this issue. See *State v. O'Brien*, 2014 WI 54, 2014 Wisc. LEXIS 463. Thus, it is respectfully suggested that this court needs to rule on whether or not § 970.038 was properly applied to the preliminary hearing in this case for the purpose of allowing the state to obtain a bind-over premised upon nothing but double hearsay evidence allegedly obtained from SJH.

A circuit court's decision to allow the admission of

evidence is usually a matter of the circuit court's discretion, but whether or not the admission of evidence violates a defendant's constitutional rights presents a question of law subject to this court's independent review. *State v. O'Brien*, 2013 WI App. 97, ¶ 8; citing, *State v. Jensen*, 2007 WI 26, ¶ 12, 299 Wis. 2d 267, 727 N.W.2d 518.

Both the state and federal constitutions prohibit *ex post facto* laws. See Wis. Const. Art. 1, § 12; U.S. Const. Art. I, § 9, cl. 3 and Art. I, § 10.[3] However, Wisconsin's *ex post facto* clause pertains only to laws which: (1) punishes as a crime any act not criminal when committed; (2) increases the punishment for a crime after its commission; and (3) deprives a defendant of a defense available at the time of the alleged commission of the crime. See *State v. Haines,* 2003 WI 39, ¶ 9, 261 Wis. 2d 139, 661 N.W.2d 72, 2003 Wisc. LEXIS 403 (citation omitted). Therefore, at the preliminary hearing, and in his Motion To Dismiss, Hull asserted that the application of Wis. Stat. § 970.038 to his case violated the *ex post facto* clauses in the federal constitution. R. 10; R. 27. Hull also raised this issue and argued it on the record. R. 40 at 7 following.

Hull's *ex post facto* objection is premised upon *Peugh v. United States,* 133 S. Ct. 2072, 186 L. Ed. 2d 84, 2013 LEXIS 4359 (Decided, June 10, 2013). In *Peugh* the court wrote:

> The Constitution prohibits both federal and state governments from enacting any "*ex post facto* Law." Art. I, §9, cl. 3; Art. I, §10. The phrase "'*ex post facto* law' was a term of art with an established meaning at

[3] Wis. Const. Art. 1, § 12 provides that: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."

> the time of the framing." *Collins v. Youngblood, 497 U. S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)*. In *Calder v. Bull*, Justice Chase reviewed the definition that the term had acquired in English common law:
>
> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. **4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender**." *3 Dall., at 390, 3 U. S. 386, 1 L. Ed. 648.*

Peugh, 133 S. Ct. at 2081, citing *Calder v. Bull,* 3 Dall. 386, 390, 3 U.S. 386, 1 L. Ed. 648 (1798); and *Carmell v. Texas,* 529 U. S. 513, 521-525, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000)(emphasis deleted, emphasis added).

The fourth category of *ex post facto* laws set forth above (in bold) is applicable in this case. Obviously, § 970.038 "... alters the legal rules of evidence..." applicable when Hull allegedly assaulted SJH. However, the court commissioner held that *Calder* did not apply because § 970.038 does not pertain to convicting Mr. Hull at trial. R. 41 at 4-6; App. at 122-24.. The circuit court came to the same legal conclusion. App. at 103-05.

The fourth category of *ex post facto* laws described by *Calder* doesn't mention "trials," its scope is more broad, and its language is clear and unambiguous. Under

Wisconsin's rules of criminal procedure the only way for the state ultimately to obtain a conviction is to first establish probable cause at the preliminary hearing. See Wis. Stats. § 970.03. The state did rely on § 970.038 to obtain a bind over - SJH did not testify. Given that the date of the alleged offense is long before the enactment § 970.038, the application of the statute to the preliminary hearing in this case presents a clear *ex post facto* violation.

In *Peugh* the court wrote that:

> Our holding today is consistent with basic principles of fairness that animate the *Ex Post Facto* Clause. The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison). The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. See *Weaver v. Graham, 450 U. S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)*; see also *post*, at 11-13. Even where these concerns are not directly implicated, however, the Clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell, 529 U. S., at 533, 120 S. Ct. 1620, 146 L. Ed. 2d 577*.

Peugh, 133 S. Ct. at 2084-85.

At the time SJH claims she was assaulted by Hull she would have had to testify at a preliminary hearing in order for the state to establish probable cause. The state should have to abide by the laws in place as of the date of

allegations in the criminal complaint.

Thus, this court should rule that Wis. Stat. § 970.038 cannot be relied upon by the state in this case to obtain a bind-over at a preliminary hearing. And this court should remand this case with instructions that a new preliminary hearing be held under the laws in place at the time of the alleged commission of the offense.

II. THE COURT COMMISSIONER IMPROPERLY TERMINATED THE PRELIMINARY HEARING AND PREVENTED THE DEFENSE FROM SUBPOENAING THE ALLEGED VICTIM AS A DEFENSE WITNESS.

Below the court commissioner simply stopped the preliminary hearing after finding he had heard enough evidence to make a probable cause finding.[4] The court commissioner did not adjourn and continue the preliminary hearing so that Hull could subpoena and call SJH as a defense witness. R. 42 at 24; App. at 154. For its part the circuit court relied upon § 970.038 and the court of appeals' *OBrien* decision in finding that the court commissioner's actions in this regard were proper. R. 30; App. at 105-07.

The Wisconsin Supreme Court has affirmed a defendant's right to compulsory process at a preliminary hearing. *O'Brien*, 2014 WI 54, ¶ 34. The court ruled that § 970.038 does not prevent defendants from calling witnesses. *Id.* At ¶ 35. The court explicitly ruled that:

> Counsel retains the ability to cross-examine the witnesses presented by the State, challenge the plausibility of the charges against the defendant, argue that elements are not met, and present witnesses on behalf of the defendant. *Wis. Stat. § 970.03*.

O'Brien, 2014 WI 54, ¶ 43.[5] The court emphasized that:

> Like the court of appeals, "[w]e reject any implication in the prosecution's arguments before the trial court that the enactment of *970.038* somehow limited the defense's ability to call or cross-examine witnesses at the preliminary examination." *O'Brien, 34 Wis. 2d 667, ¶21.*

O'Brien, 2014 WI 54, ¶ 34

The *O'Brien* decision does hold that the statutory right to call a witness is "not an unrestricted right," and that a subpoena may be quashed or evidence excluded if it is not relevant. *O'Brien*, 2014 WI 54, ¶ 37.

The court in *O'Brien* writes that:

> Counsel's statements at the preliminary examination reveal that Martin O'Brien sought to subpoena S.M.O., a child witness, for purposes of discovery. When asked for a proffer as to what S.M.O. would testify about, counsel for Martin O'Brien responded that Investigator Domino's statements were a summary and did not necessarily tell the whole story. Counsel suggested that the

---

[5] Wis. Stat. § 970.03(5) provides that:

> All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross-examination.

> victim's statements could have been taken out of context. She explained that the complete story could reveal that certain actions were not intentional. However, she indicated that the victim may not contradict Investigator Domino's testimony, stating "I don't really know." Absent any idea what S.M.O. would testify to, counsel's proffer was insufficient to show that S.M.O.'s testimony would be relevant to the probable cause inquiry.

O'Brien, 2014 WI 54, ¶ 38. Thus, the circuit court found that Mr. O'Brien's lawyer failed to establish that the testimony she sought to introduce would be relevant. *Id.* at ¶ 39.

Here, Hull explained to the court commissioner at length, in writing, why SHJ's testimony was relevant to the probable cause determination:

> Plainly, the alleged victim's testimony is relevant to the determination of probable cause, which includes the plausibility of the alleged victim's claims. The alleged victim claims that in February, 2011, she was forcibly sexually assaulted by defendant in a hotel room while her father was in the same room, sleeping in the "next bed." She claims she may have been drugged. She claims that after she was sexually assaulted that the defendant threw her on the other bed, and then apparently went to sleep. She claims that she told her dad the next day that defendant "...was acting really weird and he was touching her." The alleged victim notes that "...her dad did not believe her." See Complaint at 2-3. Then, according to the complaint, the victim waited for one year, until February 27, 2012, to

report that she had been forcefully sexually assaulted by a man, whom as to her, is a stranger (she claims defendant is a friend of her dad's but apparently had otherwise never meet defendant). It is implausible that a victim of a forcible sexual assault by a stranger would not run away from the scene of the crime and/or report the crime immediately.

The alleged victim's appearance at the preliminary hearing is necessary so that, in addition to the important functions of counsel outlined above in *Coleman,* counsel can test the plausibility of the alleged victim's allegations. For example, did the victim scream for help when she was assaulted? Did she run out of the room after she was assaulted and ask for help? Did she have her cell phone with her? Did defendant prevent her from calling for help, waking up her dad, or leaving the hotel room? Did she have sperm on her person, or her clothes? Did she have marks or contusions from the force defendant allegedly used upon her? Were those marks or contusions visible to others? Did she show those marks or contusions to her dad when he said he didn't believe her? Why did she allegedly tell her dad that defendant "touched" her as opposed to telling him that defendant allegedly raped her? What was her reason for waiting one year to report that a total stranger raped her, *et cetera?*

The foregoing questions and similar questions must be put to alleged victim, and answered by her. A non-witness reading from a report cannot answer these questions which pertain to plausibility. Upon cross-examination the alleged victim's

> account is likely to be shown to be implausible, and without more, insufficient to support a finding of probable cause. However, if the court prevents the defense from subpoenaing the alleged victim, then the plausibility of her account will never be tested prior to the probable cause determination.

R. 9 at 4-5. See also: Trial counsel's proffer argument at App. 144 following.

Thus, SJH's testimony would have been relevant to both challenging the states purported showing of probable cause and the plausibility of SJH's allegations. Both the court commissioner and the circuit court erred in preventing Hull from calling SJH as a defense witness because:

> Testing the plausibility of the witness's statement still implicates adversarial testing. *Wisconsin Stat. § 970.03(5)* remains unchanged.

O'Brien, 2014 WI 54, ¶ 53. Yet, Hull never had the opportunity to challenge probable cause or test the plausibility of SJH's allegations.

In effect, there has been no preliminary hearing in this case. SJH's written statement is just a handwritten version of the probable cause section of the criminal complaint. (Compare R. 2, App. at 118-19 to R. R. 13; App. at 118-19). The fact that Det. Linzmeier read SJH's statement and then testified as to what it says adds nothing to the analysis. At best, the preliminary hearing that Hull did get was reduced to farce just as anticipated by the dissent in *O'Brien*. *O'Brien*, 2014 WI 54, ¶ 84 (Abrahamson, Shirley, C.J., *dissenting*).

CONCLUSION

For all the foregoing reasons Hull respectfully request that this court find that Wis. Stats. § 970.038 cannot be applied to this. Hull further requests that circuit court's order be reversed, and that this matter be remanded with an order granting a new preliminary hearing to be conducted as required by the laws in effect at the time of the alleged commission of the charged crime.

Dated: August 18, 2014.

Respectfully submitted,

_____
Rick B. Meier
State Bar. No. 1019531
Attorney for David E. Hull

Ellis Street Law Office
208 Ellis Street (Upper)
P.O. Box 215
Kewaunee, WI 54216
phone (920) 606-7166

CERTIFICATION ON FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,636words.

Signed,

_____
Rick B. Meier
State Bar. No. 1019531

CERTIFICATION ON CONTENTS 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 s. 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 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.

Signed:

_____

Rick B. Meier
State Bar. No. 1019531

TABLE OF CONTENTS OF APPENDIX