RECEIVED
03-08-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP1977 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ALEXANDER M. SCHULTZ,

Defendant-Appellant

On appeal from the Circuit Court for Lincoln County,

The Honorable Robert R. Russell, presiding

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF THE DEFENDANT-APPELLANT ALEXANDER M. SCHULTZ

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

I. Table of Contents.

II. Table of Authorities.

Cases

Statutes

Other Authorities

Constitutional Provisions

III. Argument.

A. An information cannot be constructively amended after a not guilty verdict if that amendment would prejudice a defendant's constitutional protections under the Double Jeopardy Clause.

In its brief "[t]he State concedes that a reasonable person would generally construe `early fall' to include October 19 for the reasons stated in Schultz's brief." (State's brief, p. 23). It is therefore necessary for the State to find some reason to convince this Court that the information in Schultz's case actually alleged a timeframe which was different from the timeframe of "late summer of 2012 to the early fall of 2012" which the words of the information clearly relate. (R.90:1; Appx. 15). The State attempts to achieve this feat by arguing that the timeframe alleged in the information in Schultz's case was constructively amended to end on September 30, 2012, by operation of the second sentence of Wisconsin Statutes section 971.29(2). (*see* State's brief, p. 9-12).

Section 971.29(2) provides as follows:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

Wis. Stat. § 971.29(2). Basically, the State would have this Court bifurcate the statute into two parts, read out the first sentence, and then read only the second sentence of the statute to constructively amend the information by operation of law (presumably in all cases) to conform to the evidence. ***Id.*** The State argues this is so because the first sentence of the statute contains the word "may" while the second sentence contains the word "shall." ***Id***. The State completely ignores the issue of whether such a constructive amendment could take place if it "prejudices" a defendant's constitutional protections under the Double Jeopardy Clause. Apparently, however, the State does believe that section 971.29(2) will affect such a change by operation of law, even if the amendment would severely prejudice a defendant's constitutional protections under the Double Jeopardy Clause.

As will be argued below, this is an erroneous construction of the statute which violates a whole host of judicial canons relating to the construction of statutes, including the "Whole-Text" canon, the "Harmonious Reading" canon, the "Absurdity Doctrine," and the "Constitutional-Doubt" canon. It also happens to be a construction of the statute which conflicts with existing precedent of both Wisconsin and federal courts.

"Prejudice has always been a consideration with regard to amending a charging document." ***State v. Gerard***, 189 Wis.2d 505, 517 fn. 9, 525 N.W.2d 718 (1995), *citing* ***State v. Wickstrom***, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) and ***Whitaker v. State***, 83 Wis.2d 368, 265 N.W.2d 575 (1978); *see also*, ***Wagner v. State***, 60 Wis.2d 722, 726, 211 N.W.2d 449 (1973) ("The rule in this state is then that the trial court may allow amendment of an information at any time in the absence of prejudice to the defendant."); ***State v. DeRango***, 229 Wis.2d 1, 26, 599 N.W.2d 27 (1999) ("Section 971.29(2), stats., permits the amendment of criminal charges at trial in order `to conform to the proof where such amendment is not prejudicial to the defendant.'"); and *see* ***In re Tawanna H.***, 223 Wis.2d 572, 577, 590 N.W.2d 276 (1998) ("Case law supports the statutorily mandated `absence of prejudice' requirement."). The absence of prejudice requirement is not simply a statutory requirement. "Due process protects an accused against unfair prejudice in conducting an adversarial proceeding." ***In re Tawanna H.***, 223 Wis.2d at 579. Accordingly, in ***Tawanna H.*** this Court held that "... the case law developed under ***Wagner*** and its progeny (most recently affirmed in ***Koeppen***,[1] relating to § 971.29(2), STATS.) applies with equal force to juvenile proceedings." ***Id.*** at 580. The court further held that the trial judge violated the juvenile's due process rights by amending the petition, sua sponte and without notice, to conform with the evidence, where that amendment prejudiced the juvenile. ***Id.*** at 581.

---

[1] ***State v. Koeppen***, 195 Wis.2d 117, 536 N.W.2d 386 (1995).

While most cases examining the "prejudice requirement" focus on whether the amendment will prejudice the accused's ability "to understand the offense charged so he can prepare his defense" (*e.g. see* ***Wickstrom***, 118 Wis.2d at 348), whether the amendment will prejudice to the defendant's constitutional protections under the Double Jeopardy Clause is also a consideration. ***Holesome v. State***, 40 Wis.2d 95, 102, 161 N.W.2d 283, 287 (1968); *see also* ***United States v. Stoner***, 98 F.3d 527, 536 (10th Cir. 1996) ("In addition to prejudicing a defendant's Sixth Amendment right to notice of the charges against her, a variance [to an indictment] can be so great as to violate the defendant's Fifth Amendment right against double jeopardy because `a conviction based on the indictment would not bar a subsequent prosecution for the same offense.'"); ***Berger v. United States***, 295 U.S. 78, 83 (1935) (holding that a variance between the facts proven at trial and charges alleged in the indictment is impermissible where it deprives the defendant of the right against double jeopardy); ***United States v. DiPasquale***, 740 F.2d 1282, 1294 (3rd Cir. 1984) (holding that a variance between overt acts is impermissible when it violates the defendant's right against double jeopardy); *and see* ***United States v. Crowder***, 346 F.2d 1 (6th Cir. 1964) (holding that the variance between facts alleged in the indictment and facts proved at trial was permissible *because the charge in the indictment protected him against another prosecution*).

Crowder is particularly instructive to this case. In ***Crowder*** the defendant was prosecuted for conspiracy to transport stolen and forged money orders in interstate commerce. ***Id.*** at 1. The money orders were identified in the indictment by series, not individually. ***Id.*** at 3. At trial, however, the prosecution only presented evidence for twelve specific money orders within those series; there were of course numerous money orders in the series for which no proof was offered at all. ***Id.*** While the court in ***Crowder*** observed "that the evidence actually offered at the trial may be adduced to demonstrate the precise circumstances upon which his conviction rested," the court held that the failure to provide specific proof for other money orders set forth in indictment did not

prevent defendant from being protected against subsequent jeopardy for the same offense. ***Id.*** The indictment would protect him against another prosecution. ***Id.***

Which is why the court in ***United States v. Olmeda***, 461 F.3d 271, 282 (2nd Cir. 2006) held that "[t]o determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." (emphasis added). The charging document itself provides protection against subsequent jeopardy for the same offense. And contrary the State's assertion otherwise, ***Olmeda*** is no "outlier". (State's brief, p. 15). ***Olmeda*** has been cited in recent years for the exactly the above proposition in ***United States v. Basciano***, 599 F.3d 184, 197 (2nd Cir. 2010); ***United States v. Schnittker***, 807 F.3d 77, 82 (4th Cir. 2015); ***United States v. Bruno***, 159 F.Supp.3d 311, 315 (E.D. N.Y. 2016); and ***United States v. Gross***, 2017 WL 4685111, 33 (S.D. N.Y. Oct. 18, 2017; Suppl. Appx. 27).

Of course, the most relevant case for this appeal is the one the State does not address in its brief at all, ***State v. Fawcett***, 145 Wis.2d 244, 426 N.W.2d 91 (1988). In ***Fawcett***, this Court addressed the charging of timeframes in child sexual abuse cases. This Court held that:

> 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*.

Id. at 251 *quoting* ***Holesome***, 40 Wis.2d 95, at 102 (emphasis added). That is, the information serves two functions, the first is to ensure that the defendant understands the offense charged so he can prepare his defense, and the second is to preserve the defendant's constitutional protections under the Double Jeopardy Clause. In ***Fawcett,*** this Court held that the State is given considerable flexibility in charging the timeframe in child sexual abuse cases. ***Id.*** at 255. Accordingly,

"[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." ***Id.*** The State now seeks a flexible double jeopardy analysis as well, it cannot have it both ways.

Ultimately, what the State fails to appreciate is that while the prosecutor may have failed to present any evidence of sexual assaults by Schultz for the month of October 2012, Schultz still had to prepare a defense against the potential accusation that he sexually assaulted M.T. in the month of October 2012.[2] Shultz was charged with sexual assaults within a timeframe which included the month of October 2012. At the time jeopardy attached, that is when the jury was sworn, Schultz was certainly in jeopardy of being convicted of sexual assaults which occurred during the month of October 2012. He was never put on notice that the accusations made by M.T. would be limited at trial to the months of July through September.

Incredibly, the State would actually penalize Schultz for *not* objecting to testimony by M.T. that she didn't have sex with Schultz in the month of October 2012. (State's Brief p. 17). In the State's analysis, M.T.'s testimony that sexual relations with Schultz ended in September, coupled with Schultz's failure to object to that testimony because she failed to include allegations of sexual assault in the month of October, made subsequent prosecutions for the month of October now fair game. ***Id.*** This is absurd.[3] The Double Jeopardy Clause, if it protects than anything, is supposed to protect the accused from "having to `run the gantlet' a second time." ***Ashe v. Swenson***, 397 U.S. 436, 445-46 (1970). And yet, Schultz was made to run the gantlet a second time.

---

[2] Indeed, why would Schultz *not* have anticipated such testimony?

[3] Consider, would Schultz's trial counsel in the first case then be ineffective in his representation because he did not object to M.T. testifying there was no sexual assault in October, and thereby failed to preserve Schultz's constitutional protections under the Double Jeopardy Clause?

B. The State's arguments to avoid the prejudice requirement Wisconsin Statutes section 971.29(2) are an absurd, erroneous, and unconstitutional construction of the statute.

1. The State's construction of the statute would lead to absurd results.

It has long and widely been held that a statute will not be construed in a manner that leads to absurd or unreasonable results. ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis.2d 633, ¶ 46, 681 N.W.2d 110, 2004 WI 58; *see also,* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* § 37, at 234 (2012) (the "Absurdity Doctrine"). The absurdity of the State's construction can be easily demonstrated here.

By the State's reasoning, if a prosecutor at the close of evidence, but prior to jury deliberations, requested an amendment to the information to move back the timeframe from "early fall" (which ends no earlier than October 23rd) to an end date of September 30th, the prosecutor would have to demonstrate that the amendment did not prejudice the defendant's constitutional protections under the Double Jeopardy Clause. (For the first sentence clearly prohibits an amendment to conform to the evidence at trial which would "prejudice" the defendant). In our hypothetical, we can imagine the prosecutor telling the court, "you know judge, I really didn't put on any evidence of sexual relations in October, but if I had a little more time I think I might come up with that evidence. Why don't we change that end date to September 30th, just to keep my options open for the future." No doubt, if a prosecutor were to do so, the court would deny the motion to amend because doing so would prejudice the defendant's double jeopardy protections.

However, under the State's "plain language" argument, if the prosecutor simply keeps his mouth shut, as he did here, then by operation of law the information "shall" be constructively amended to move the scope of jeopardy back from October 23rd to September 30th, simply based upon evidence that was adduced at trial, and notwithstanding that the amendment would cause extreme prejudice to the defendant's constitutional protections under the Double Jeopardy

Clause. Under the State's interpretation of the statute, a prosecutor may achieve by stealth, that which he could not do openly. That is an absurd result.

2. The State construction of the statute ignores the Whole Text of the statute and fails to engage in a Harmonious Reading of the statute's constituent parts.

"[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 271 Wis.2d 633, at ¶ 46. That is to say, this Court is to read the whole text and strive to give the whole text a harmonious reading. *See also,* Scalia & Garner, *supra* § 24 (the "Whole-Text Canon") and § 27 (the "Harmonious-Reading Canon"), at 167 and 180. To achieve the reading of section 971.29(2) that the State wishes, it is necessary to read out of the statute the first sentence which bars amendments to conform the information with the evidence adduced at trial when that amendment will cause "prejudice" to the defendant. As stated above that would lead to absurd results, and as will be argued below to an unconstitutional result as well. A more harmonious reading of the statute is to recognize that the "prejudice requirement" is always present when the information is amended to conform with the evidence, whether that amendment occurs at trial by motion of the State, or after the verdict by operation of law. As argued above, that is already Wisconsin law.

It must be remembered that the whole point of section 971.29(2) is to cure "technical variances" in the charging documents, where that amendment would not prejudice the defendant. ***State v. Duda***, 60 Wis.2d 431, 440, 210 N.W.2d 763 (1973) (*see*, the examples listed in ***Duda*** at 440). What the State is requesting is not a harmless cure to a "technical variance" in the information. The State wants to strip away the defendant's constitutional protections under the Double Jeopardy Clause that are supposed to be preserved by the filing of an information.

3. The State's construction of the statute would be unconstitutional.

"A statute should be interpreted in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *supra* § 38, at 247 (the "Constitutional-Doubt Canon"); *see also* ***State v. Hall***, 207 Wis.2d 54, 82, 557 N.W.2d 778 (1997) ("this court will strive to construe legislation so as to save it against constitutional attack"). The United States Constitution is the supreme law of the land. U.S. Const. Art. VI cl. 2. "The establishment or reduction of constitutional rights cannot be accomplished either by congressional [or state legislative] action or executive fiat. This is perhaps the most fundamental concept of constitutional supremacy." ***Clark v. Board of Education of Little Rock Sch. Dist.***, 374 F.2d 569 (8th Cir., 1967).

The State's interpretation of section 971.29(2) would clearly run afoul of the Double Jeopardy Clause. When the State charged Schultz with repeated acts of sexual assault of a child in "the late summer to early fall of 2012," he was guaranteed by the United States Constitution that he would not be put in jeopardy of being tried a second time for a sexual assault of the same child during the same timeframe. "For whatever else that constitutional guarantee may embrace, ***North Carolina v. Pearce***, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. ***Green v. United States***, 355 U.S. 184, 190, 78 S.Ct. 221, 225, 2 L.Ed.2d 199." ***Ashe v. Swenson***, 397 U.S. 436, 445-46 (1970).

The State's by its interpretation of section 971.29(2) is directing this Court toward a collision with the United States Constitution. This is totally unnecessary. All this Court needs to do to avoid bringing the constitutionality of section 971.29(2) into doubt, is to interpret the statute in the way it has always been interpreted. A charging document may not be amended if it "prejudices" the defendant. ***Wagner***, *supra*. That includes prejudice to the defendant's constitutional protections under the Double Jeopardy Clause. ***Holesome***, *supra*. The canons of statutory construction should guide this court to hold that an

information will not be constructively amended after a not guilty verdict if that amendment would prejudice a defendant's constitutional protections under the Double Jeopardy Clause.

IV. Conclusion.

Surprisingly, to Schultz anyway, this case boils down to the statutory construction of Wisconsin Statutes section 971.29(2). The State claims that an information will be constructively amended to conform to the evidence after a not guilty verdict, even if that amendment would severely prejudice a defendant's constitutional protections under the Double Jeopardy Clause. The State is wrong. Without its peculiar construction of the statute, all its other arguments fail. Therefore, Mr. Schultz again respectfully requests that this Court vacate his Judgment of Conviction on the charge of second degree sexual assault of a child and remand this case to the circuit court for the entry of a Judgment of Acquittal on that same charge.

Respectfully submitted March 6, 2018.

This brief has been electronically signed by:

Frederick A. Bechtold

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

V. Certifications.

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. The length of this brief is 2999 words.

I further certify that I served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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 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.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 March 6, 2018.

This brief has been electronically signed by:

Frederick A. Bechtold

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463
Attorney for the Defendant-Appellant

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on March 6, 2018. I further certify that the brief was correctly addressed, and postage was pre-paid.

Date: March 6, 2018.

Signature: _____