STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN EX REL. JAMIE A. COOGAN,

Petitioner-Appellant,

Iowa County Case No. 2017CV000142
v. Appeal No. 2018AP002350

STEVEN P. MICHEK, SHERIFF, IOWA COUNTY SHERIFF'S OFFICE,

Respondent-Respondent.

ON APPEAL OF A DECISION DENYING SUMMARY JUDGMENT AND AN ORDER DISMISSING THE WRIT, ENTERED IN THE IOWA COUNTY CIRCUIT COURT, THE HONORABLE W. ANDREW SHARP, PRESIDING

REPLY BRIEF OF PETITIONER-APPELLANT

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ARGUMENT

I. THIS APPEAL IS NOT MOOT BECAUSE COOGAN SOUGHT DAMAGES, AND FURTHER, EVEN IF IT IS TECHNICALLY MOOT, NUMEROUS EXCEPTIONS APPLY SUCH THAT RESPONDENT MAY NOT PREVAIL ON GROUNDS OF MOOTNESS.

An issue is moot if there is no longer a live controversy such that its "resolution will have no practical effect on the underlying controversy." ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis.2d 685, 608 N.W.2d 425. Generally, moot issues will not be reviewed on appeal. ***Id.*** That said, there

are a number of exceptions to this rule, including where the issue is of great public importance, where the constitutionality of a statute is in issue, where a decision is needed to provide guidance to the trial courts, or where the issue is capable of repetition yet will evade review because it will typically be resolved prior to the completion of the appellate process. ***Id.***

Here, contrary to Michek's conclusory assertion that because Coogan is no longer incarcerated any issue raised in this appeal is moot, *see* Respondent's Brief at 6-7, resolution of the issues raised herein will have a practical effect on the controversy: Coogan requested damages for Michek's violation of his rights under the Huber statute, and as such, should Coogan prevail upon appeal, Coogan would be entitled to prove his damages resulting from Michek's violation of his rights. (R12: 4-6). The issue of damages is not moot until and unless relief on the cause of action giving rise to the claim for damages is finally dismissed. *See* ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶30, 259 Wis.2d 276, 655 N.W.2d 510 (holding that because the circuit court should have granted mandamus relief, the issue of damages which the circuit court had found to be moot was no longer so, and ordering that a hearing on the issue of damages be held on remand).

In addition, each of the exceptions to the mootness rule apply here. The issue is one of great public importance, as it will determine whether the circuit courts across the State will have the ability to enforce their judgments of conviction providing for Huber release under Wis. Stat. § 303.08(2) and further will mean the difference between loss of employment and family homelessness for those prisoners who are granted Huber privileges but are prevented by a county sheriff's inmate classification system from exercising those privileges, to the detriment of not only such prisoners and their families, but also of such prisoners' employers (who must find replacements for such workers) as well as the State's economy as a whole. *See* ***Olson***, 233 Wis.2d 685, ¶3. In addition, guidance on this issue is needed by the circuit courts to ensure certainty in the administration and application of the Huber law, which, given the large number of jail-with-Huber sentences handed down throughout the State, further reinforces the contention that this is an issue of great public importance. *See* ***Warren v. Link Farms, Inc.***, 123 Wis.2d 485, 488, 368 N.W.2d 688 (Ct. App.

1985) (finding that issue regarding timing of rendition of a judgment awarding worker's compensation moot but addressing issue anyway due to large number of worker's compensation awards across the State).

The issue of the constitutionality of Wis. Stat. §§ 303.08(2) and (10) is also presented here, satisfying still another exception to the mootness rule, ***Olson***, 233 Wis.2d 685, ¶3, and finally, the issues presented here are rather clearly capable of repetition yet will evade review. *See* ***id.*** This is so because by definition, a sentence to a county jail will normally last for not more than one year,[1] and as this case itself demonstrates, the appellate process will ordinarily not have concluded prior to the expiration of such sentences. As such, the issues in this action are either not moot or, even if they are, all of the exceptions to the mootness doctrine apply, and in either event, Michek cannot prevail on grounds of mootness.

II. MICHEK'S INTERPRETATION OF THE SHERIFF'S CONSTITUTIONAL POWERS SWEEPS TOO BROADLY, STRETCHING THE STATE ON A BED OF PROCRUSTES, AND FURTHER, MICHEK'S STATUTORY ARGUMENT VIOLATES THE PRINCIPLE OF STATUTORY CONSTRUCTION THAT THE MORE SPECIFIC STATUTE CONTROLS OVER A GENERAL STATUTE.

Michek repeatedly states the uninformative proposition that a county sheriff has both the power and the duty under both the constitution and the statutes to operate a jail and to "provide for the care and custody of the jail and the prisoners therein." Respondent's Brief at 8-11, 13. Michek further argues that determining the custody classification of prisoners is likewise a duty of the sheriff's which is of constitutional dimension. ***Id.*** at 15-16, 18-19. These contentions miss the point, which is simply that while it is true that the operation of a jail and the custody and care of the prisoners therein is a constitutional duty of the sheriff, the constitutional dimensions of that duty must not be interpreted too broadly, lest the State be "stretched on a bed of Procrustes" by requiring it to resort to a

[1] *See* Wis. Stat. § 973.02.

constitutional amendment to alter the slightest detail as to the administration of jail sentences. *See* ***State ex rel. Milwaukee County v. Buech***, 171 Wis. 474, 482, 177 N.W. 781 (1920) ("It should not be held, in our judgment, that the constitution prohibits any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. If that were true, a constitutional amendment would be necessary in order to change the duties of sheriffs in the slightest degree . . . .").

Instead, as is argued extensively in Coogan's opening brief, whether a particular duty or power is one that "gave character and distinction" to the office of sheriff must be analyzed by examining the nature of the particular duty or power rather than by resort to the general power to have charge of the jail as Michek does. *See, e.g.*, ***Wisconsin Prof'l Police Ass'n v. Dane County***, 149 Wis. 2d 699, 710, 439 N.W.2d 625 (Ct. App. 1989) (***WPPA II***). Michek's citations to ***State ex rel. Kennedy v. Brunst*** and ***State v. Schell*** are unavailing.

In ***Brunst***, the issue was whether the entire operation of the jail and all custody of the prisoners therein could be transferred by legislative act to some officer other than the sheriff, and the court there determined that this wholesale transfer of one of the most distinctive duties of the sheriff at common law could not be done consistently with the constitution. 26 Wis. 412, 414-15 (1870). Nowhere did ***Brunst*** discuss or constitutionalize the minutiae of the care and custody of the jail and the prisoners therein, and in particular, nowhere did the ***Brunst*** court say that the legislature may not constrain the circumstances under which a sheriff may refuse to effectuate an order of the court such as a grant of Huber privileges to a jail prisoner.

This is unsurprising, as Huber privileges did not exist at the time that ***Brunst*** was decided, and as such, ***Brunst*** does Michek's argument no good, and further, the sheriff at common law was in fact required to faithfully execute all lawful orders of the court. 1 Walter H. Anderson et al., *A Treatise on the Law of Sheriffs, Coroners, and Constables* (1941), § 250. Further, the sheriff at common law was required to apply to the court if he or she wished to release a prisoner in the jail for whatever reason prior to the expiration of the

prisoner's term of commitment. ***Id.***

State v. Schell is also unavailing for Michek, as that case involved a separation of powers analysis, which first requires a finding that more than one branch of government has constitutional authority in a given area; the analysis is wholly unnecessary where, as here, only the courts have the constitutional authority to select among the sentencing options made available by the legislature. *See* ***Schell***, 2003 WI App 78, ¶16, 261 Wis.2d 841, 661 N.W.2d 503.

In that case, the court determined first that the decision whether to place a person on electronic monitoring rather than confine that person to the jail when the court had ordered probation with jail as a condition of probation fell within the realm of shared authority between the sheriff and the judiciary. ***Id.*** at ¶15. It was only then that the court ruled that the court could not prevent the sheriff from placing a probationer serving jail time as a condition of probation into the electronic monitoring program under Wis. Stat. § 302.425. ***Id.*** In so doing, the court noted that the sheriff, rather than the circuit court, was in a much better position to determine whether the safety, budgetary, and space constraints at the jail require release to electronic monitoring of prisoners serving jail time as a condition of probation. ***Id.*** at ¶19.

Of importance here, given that Huber work release was originally conceived of as a species of probation, *see* Wis. Stat. § 56.08 (Comment of Interim Committee 1947) (1947-48) (stating that Huber is a species of probation), the ***Schell*** court also noted that "[t]he legislature has determined that the judiciary is best situated to determine whether and how to place a person on probation." 261 Wis.2d 841, ¶19. The legislature has likewise determined that the judiciary is best situated to determine whether and to what extent a jail committee should be allowed release privileges for various purposes by enacting Wis. Stat. §§ 303.08(2) and 303.08(10). Accordingly, because the sheriff simply does not have the constitutional authority to restrict the exercise of Huber release privileges other than as provided in Wis. Stat. §§ 303.08(2) and 303.08(10), Michek's constitutional argument fails, and there is no separation of powers problem for the court to resolve.

Michek's reliance upon the general provisions of Wis. Stat. §§ 59.27(1), (4), and (7) is unavailing as well, as it violates a fundamental tenet of statutory construction. Where two enactments govern the same subject matter, the more specific statute controls over the general statute to the extent that there is any conflict between the two. ***State v. Hemphill***, 2006 WI App 185, ¶11, 296 Wis.2d 198, 722 N.W.2d 393 (holding that the definition of "recklessness" located in Wis. Stat. § 948.03 for purposes of that statute controls over the general criminal code definition of "recklessness" located at Wis. Stat. § 939.24(2) by virtue of the principle that the specific controls over the general). The provisions of Wis. Stat. § 59.27 granting the sheriff the general power to maintain the jail are far more broad and general than the provisions of Wis. Stat. § 303.08 regarding when and by whom the exercise of Huber privileges may be restricted or curtailed, and as such, Wis. Stat. §§ 303.08(2) and (10) control over Wis. Stat. §§ 59.27(1), (4), and (7). ***Hemphill***, 296 Wis.2d 198, ¶11.

III. ADMINISTRATION OF THE JAIL SENTENCE OF PRISONERS WITH HUBER PRIVILEGES IS NOT AN EXERCISE OF DISCRETION BUT RATHER ENTAILS A MANDATORY DUTY TO ALLOW HUBER RELEASE SO LONG AS THE PRISONER FOLLOWS THE RULES AND REGULATIONS OF THE JAIL, AND TO REFRAIN FROM RESTRICTING THE EXERCISE OF SAID PRIVILEGES OTHER THAN AS PROVIDED FOR IN WIS. STAT. § 303.08.

Michek further argues in his brief that the decision whether to deny or restrict the exercise of Huber privileges is committed to the sound discretion of the sheriff, but cites no authority for the proposition. This is unsurprising because, as Coogan argues much more extensively in his opening brief, the only authority allowing the only statutory provision granting the sheriff any authority whatsoever to deny or restrict Huber privileges on his or her own motion is located at Wis. Stat. § 303.08(10), which requires that the sheriff may only deny the

exercise of such privileges for a maximum of 5 days, and even then, only in response to a failure on the part of a prisoner with Huber privileges to adhere to the rules and regulations of the jail. There is no discretion for the sheriff to deny the exercise of Huber privileges for more than five days in any event, and there is no authority for the sheriff to do so at all unless the prisoner violates a rule or regulation of the jail. To the extent any exercise of discretion is contemplated by the statute, that discretion is limited to whether a given rule violation should result in denial of the exercise of Huber privileges for a period ranging from zero to five days. Wis. Stat. § 303.08(10).

Given the lack of discretion available to the sheriff to restrict Huber privileges for more than five days and even then only in response to some violation of the rules and regulations of the jail, Michek's application of the unrelated inmate classification system mandated by Wis. Stat. § 302.36 and Wis. Admin. Code ch. DOC § 350.21 to exceed the bounds of Wis. Stat. § 303.08(10) is an *ultra vires* act subject to mandamus relief. *See* ***Madison Metro. Sch. Dist. v. Wisconsin Dep't of Pub. Instruction***, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995) ("[a]dministrative powers are not freely and readily implied. Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it . . . Whether a power is to be implied turns on the intent of the legislature."). Given the legislature's clear direction located at Wis. Stat. § 303.08(10), it cannot be said that the legislature intended to allow the sheriff additional unstated authority under the inmate classification statute and regulation to restrict Huber privileges. As such, Michek's application of that system to restrict the exercise of Huber privileges violates the sheriff's plain duties, entitling Coogan to mandamus relief for the damage he suffered as a result of Michek's *ultra vires* acts. ***State ex rel. S.M.O.***, 110 Wis.2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982).

CONCLUSION

For the reasons stated in his opening brief as well as those stated above, Coogan reiterates his request that this court reverse the decision below and remand this matter for a hearing on Coogan's damages resulting from Michek's failure to comply with his plain duty to restrict or deny the exercise of

Huber privileges only in accordance with the provisions of Wis. Stat. § 303.08, or in the alternative, for a declaratory judgment that a county sheriff may only restrict or deny Huber privileges in accordance with the provisions of Wis. Stat. § 303.08, and in either case to remand this matter to the circuit court for such further proceedings as may be necessary.

Respectfully submitted 12/01/2019:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,426 words.

Dated 12/01/2019:

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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 12/01/2019:

_____

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