STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

---

Appeal No. 2019AP000224-CR
Appeal No. 2019AP000225-CR
Appeal No. 2019AP000226-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. JONES,

Defendant-Appellant.

---

On Appeal from the Judgment of Conviction and Order Partially Granting and Denying Postconviction Motion Entered in Outagamie County Circuit Court, the Honorable, Mark J. McGinnis Presiding

Circuit Court Case No. 2016CF000687
Circuit Court Case No. 2016CF000736
Circuit Court Case No. 2017CF000852

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

William J. Donarski
State Bar No. 1021567
Attorney for Defendant-Appellant

OFFICE ADDRESS:
Law Office of William J. Donarski
2221 South Webster Ave., #166
Green Bay, WI 54301

(920) 339-5216

**TABLE OF CONTENT**


Authorities Cited ..... ii

Argument ..... 1

I. Jones Has Standing to Challenge the Use of His Own Bond Money ..... 1

II. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT A CASE THAT WAS DISMISSED AND READ-IN WAS SOMETHING LESS THAN A DISMISSAL ..... 3

CONCLUSION ..... 13

CERTIFICATION ON FORMAT ..... 14

CERTIFICATION OF ELECTRONIC FILING ..... 14

CERTIFICATION OF MAILING ..... 15

## AUTHORITIES CITES

**CASES CITED**


State v. Cetnarowski, 166 Wis. 2d 700,
480 N.W.2d 790 (Ct. App. 1992) ..... 6

State ex. rel. Glidden v. Fowler,
192 Wis. 151, 212 N.W. 263 (1927) ..... 2

State v. Iglesias, 185 Wis.2d 117, 132-33,
517 N.W.2d 175 (1994) ..... 1,2

State v. Martel, 2003 WI 70, ¶21,
262 Wis.2d 483, 664 N.W.2d 69 ..... 8

State v. Milashoski, 159 Wis.2d 99, 109,
464 N.W.2d 433 (Ct. App. 1990) ..... 1

State v. Welkos, 14 Wis.2d 186, 192,
109 N.W.2d 889 (1961) ..... 5


**WISCONSIN STATUES CITED**


2005 Wis. Act 447 ..... 6

§968.01 ..... 9

§969.03(4) ..... 1, *passim*

§969.03(5) ..... 8-9, 13

§973.20 ..... 4

§973.20(1g)(a) ..... 4, 5

§973.20(1g)(b) ..... 5

§973.20(9m) ..... 6,7


**OTHER LEGAL RESOURCES**


The Law Dictionary, which features
Black's Law Dictionary Free
Online Legal Dictionary 2nd Ed.,
thelawdictionary.org/prosecution/ ..... 12

## ARGUMENT

### I. Jones Has Standing Challenge the Use of His Own Bond Money

The State raises for the first time on appeal the issue of standing. The State claims that Jones does not have standing because he does not have a personal interest in the case since he did not post the bond money himself. However, the State fails to cite any authority regarding the standing of criminal defendants to raise issues about their own bond money. In addition, this issue was waived by the State because they did not raise it before the trial court. State v. Milashoski, 159 Wis.2d 99, 109, 464 N.W.2d 433 (Ct. App. 1990). Without the issue of standing being fully litigated at the trial level, this Court would not be able to meaningfully address the issue of standing.

However, the Wisconsin Supreme Court has ruled on this issue, and ruled that both the persons who posted bond money under §969.03(4), Stats, and the defendant whose bond it is, have standing to raise an issue about the application of the money. State v. Iglesias, 185 Wis.2d 117, 132-33, 517 N.W.2d 175 (1994).

In the Iglesias case, both the defendant, Iglesias, and the two persons who posted her bond money, Miller and Bochler, appealed the trial courts use of bond money to pay a fine that was imposed on Iglesias. Id.

The Wisconsin Supreme Court first noted the general standard of review for standing, noting that "A party has standing to challenge a statute if that statute causes that party injury in fact and the party has a personal stake in the outcome of the action." Id.[1] That court also noted that "the law of standing is not to be construed narrowly or restrictively." Id.[2] It finally set the rule that "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Id.[1]

The Wisconsin Supreme Court then ruled that there was absolutely no difficulty determining that all the appellants had standing to challenge §969.03(4), Stats, and "[C]ertainly, Iglesias has a sufficient 'personal stake' in the terms of her own bail and sentence so as to give her standing." Id.

In this case, just as in Iglesias, Jones has standing

---

[1]Internal citations omitted.

[2]Internal citations omitted.

[1]Internal citations omitted.

to raise issues about his own bail money and sentence. First, "under Wisconsin law, money posted for bail, irrespective of its source, is conclusively presumed to be the defendant's money. Id. at 130-31, *citing* State ex. rel. Glidden v. Fowler, 192 Wis. 151, 212 N.W. 263 (1927). Therefore, the bond money was Jones' money, and thus he has a personal stake in the controversy. Second, even though his friend and his mother posted the money, Jones is injured by the Court's use of the bond money contrary to statutory authority. Besides any citizen's concern that the statutes be followed as written, any trust and/or goodwill of his friend and family who posted the money are at stake and would be diminished or voided by an inappropriate use of the money. Finally, Jones has the "concrete adverseness" necessary to sharpen the presentation of the issues. The use of the bail money is, after all, the consequence of a sentence after a conviction. And it was Jones who was convicted and sentenced. He therefore has standing.

## II. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT A CASE THAT WAS DISMISSED AND READ-IN WAS SOMETHING LESS THAN A DISMISSAL.

The State's main argument is that a case that has been dismissed and read-in is somehow not a full dismissal. The main error in the State's argument is that it ignores the statutory language controlling the release of bond money

first requires that there be a judgment of conviction before any money can be used for restitution. §939.03(4), Stats., clearly states that "If a judgment of conviction is entered in a prosecution in which a deposit had been made..." This clearly first requires a judgment of conviction. For the two cases where a deposit was made, there was no judgment of conviction since those two cases were dismissed.

The original Brief filed by Jones clearly set forth the statutory construction argument at issue in this appeal. That argument will not be repeated again in the Reply Brief. Rather, the main errors in the State's argument will be noted and explained. As clearly set forth in the original Brief, this appeal is mostly over the definition of the term "prosecution" used in §939.03(4), Stats.

The restitution statute, §973.20, says that restitution can be ordered for any crime considered at sentencing. The definition of "crime considered at sentencing" was clearly set forth in §973.20(1g)(a). The State argues that the legislature abandoned that clear definition and simply used the term "prosecution" to mean the same thing as any "crime considered at sentencing". Not only does that violate statutory construction rules, but it is putting language in the statute that the legislature didn't put there.

The State even quotes a rule of statutory construction

that seems to mandate that "prosecution" does not mean the same thing as "any crime considered at sentencing". (State's Brief at 12). State v. Welkos, 14 Wis.2d 186, 192, 109 N.W.2d 889 (1961), is cited for the proposition that "where a statute with respect to one subject contains a given provision, the omission of such a provision from a similar statute concerning a related subject is significant in showing that a different intention existed." After all, the restitution statute is a related subject to the bond statute, as the one cites specifically to the other. And, the restitution statute clearly defines the term "Crime considered at sentencing" and "Read-in crime" at §973.20(1g)(a) and (b), Stats. Therefore, using the State's argument, it is "significant" that different terms are used, and it clearly shows that a different intention existed.

The State also spends a lot of time arguing about the policy of the restitution statute being changed to allow restitution to be paid out of the bond money posted on the case. First, there is no argument that the statute allows restitution to be ordered for any crime considered at sentencing. As clearly stated in Jones' brief, there is no objection to the restitution amounts that were ordered and Jones acknowledges that he owes the money as restitution, and it can be collected under any statutorily permitted

means.

However, Jones is merely making the same argument that was made in State v. Cetnarowski, 166 Wis. 2d 700, 480 N.W.2d 790 (Ct. App. 1992). As the State noted in it Brief at 17, this Court ruled that there was no statutory authority (at that time) to use bail money for restitution. At that time, the legislature had the opportunity to include restitution together with fines and costs, that could be paid out of bond money, however, it did not. In the same way, with the amendment to §969.03(4), Stats., the legislature could have chosen to use the term "any crime considered at sentencing". Rather, it chose to keep the term "prosecution", which therefore must mean something different than "any crime considered at sentencing."

The fact that the legislature amended the restitution statute after the Cetnarowski decision actually makes it even more clear that the legislature knew what it was doing and chose the term "prosecution" in §939.03(4), Stats., to mean something different, as both statutes were amended at the same time. As shown by 2005 Wisconsin Act 447, included in the State's Appendix, Section 9 of that act amended the bond statue, §939.03(4), but Section 12, also amended the restitution statute, but only at §973.20(9m), Stats. The legislature considered the two statutes together.

Importantly, the legislature only amended the restitution statute by creating §973.20(9m), which has nothing to do with the direct issue in this appeal. However, when considering both statutes in the same Act, it chose to amend §969.03(4) by adding the term "conviction" to make clear that a "judgment of conviction" is first necessary. Then the legislature chose to keep the term "prosecution" as the modifier for "in which a deposit has been made..." But, the legislature did not make any changes to the defined term, "crime considered at sentencing" in the restitution statute. With this history, any argument that the term "crime considered at sentencing" means the exact same thing as "prosecution" ignores all the rules of statutory construction.

Contrary to the State's argument, the amendments to the bond statute do not state that the "restitution towards victims comes before any other payments **or repayments**." (emphasis added) (State'e Brief at 15). It is unclear where the State got the phrase "or repayments" from as it is not in the statute. Rather, all this amendment clarifies is that just like fines and costs before the Cetnarowski decision, now restitution can also be paid out of the bond money. But, most importantly, the amendment to the bond statute did not change the requirement that there must first

be a conviction in a prosecution in which a deposit has been made. None of the State's arguments shows that the term "prosecution" which is nowhere defined, does not mean a single complaint charging a defendant with a crime.

The amendment to the bond statute also did not change §939.03(5), Stats. This subsection requires the bond money to be returned to the person who posted the money if the complaint against the defendant has been dismissed. There is no dispute that the two complaints against Jones in which bond money was deposited were dismissed. The State tries to make the argument that a dismissed and read-in case is somehow different, but there is no dispute that it is still dismissed. There is no judgment of conviction.

The Wisconsin Supreme Court has made clear that a read-in offense is a dismissal. "Needless to say, there is no conviction for an offense that is dismissed and read-in..." State v. Martel, 2003 WI 70, ¶21, 262 Wis.2d 483, 664 N.W.2d 69. The argument that a dismissed and read-in case is not a dismissal only makes sense if one believes that it is really a conviction. If there is no conviction, and thus no judgment of conviction, then §969.03(4), Stats., never comes into play.

As argued in the original Brief, there is no valid interpretation of a case that has been dismissed and read-in

as anything other than a dismissal. Since it is a dismissed complaint, §969.03(5), Stats., requires the bond money to be returned.

That statute subsection (5) uses the phrase"If the complaint against the defendant has been dismissed ...the entire sum deposited shall be returned." The use of the term "Complaint" in this subsection clearly refers to one action initiated pursuant to §968.01, Stats. The term "Complaint" clearly refers to a single prosecutorial unit. It is not plural, and clearly does not mean any and all offenses that a defendant might have pending at any one time, since each of those would have their own "Complaint" to initiate the proceeding.

While many arguments have been made to suggest legislative intent, or policy considerations favoring victims, the statutory authority relies on the words the legislature chose to use. The State argues that if the legislature wanted to make clear that §969.03(4) was referencing each complaint as a single prosecutorial unit, that it could have said so. (State's Brief at 19). However, the legislature chose to use the term "prosecution", and Jones argues that means a single prosecutorial unit, that is, each Complaint. More telling though, is they could have chosen to use the term "crime considered at sentencing"

which they took pains to define, instead of "prosecution" if they intended the result the State argues.

The State also repeatedly argues public policy and victim's rights. However, public policy needs to consider the efficient administration of justice, and not just victim's rights. As an example, it is often up to family or friends to post any bail money, as the defendant is in custody and lacks access to banks and such. But, also, especially for indigent clients like Jones, they have no funds and would be forced to stay in custody during the pendency of the case if family or friends would not be willing to post bail.

In addition, as a hypothetical example, what type of chilling message would it send to family and friends if their money was taken from them in the following scenario: Jones' mother posts $2,500.00 bail on the first case, the Possession of Burglarious Tools case, because she is convinced of his innocence and trusts the money will be returned after the case is dismissed. Then after he is released, he commits more crimes, which she believes he did commit, so she doesn't post any more money. Then, instead of taking a plea bargain, Jones goes to trial and wins on the first case, and is thus acquitted; or, after meeting with witnesses, the DA determines that it can't meet it's

burden of proof and dismisses the first case. However, several months later, he takes a plea bargain on the subsequent cases, and owes restitution on those cases. Under the State's argument, that the term "prosecution" means all pending cases against a defendant, Jones' mother's money is taken and applied to restitution on a distinct and unrelated case, even though the complaint that she posted money on was dismissed.

Between Jones' mother and the victim in the distinct and unrelated case, there can be no weighing of the equities because they are apples and oranges. Jones' mother is no more at fault than the separate victim. Why should the distinct and separate victim have a better claim to the money than Jones' mother. Rather, the better policy is that the persons who posted bail money should only have to analyze the single case against the defendant on which they post bail to judge how much risk they are undertaking.

To claim that it makes a difference that the case was dismissed and read-in, rather than just dismissed, is adding another liability and consequence to the read-in process that is not currently in the statutes or the case law.

Finally, the term "prosecution" is not defined in the statutes, nor in any other relevant authority. As such, one would normally turn to a legal dictionary for guidance. The

use of Black's Dictionary definition from 1990 merely reflects how long ago the dictionary was purchased. It is unclear why the state characterized it as a "hand-picked" definition. (State's Brief at 22). The current online version of The Law Dictionary, which features Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., has a definition for the term "prosecution" as:

> A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime. U.S. v. Reis-Inger, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed. 480.[2]

This is the same initial definition as the 1990 edition.

The definition the State obtains from a newer Black's Law Dictionary is not any more definitive. (State's Brief at 23). In fact, the State's definition of "prosecution" as "a criminal proceeding in which an accused person is tried" can be argued to be even better for Jones' argument. It implies a single proceeding and a trial. Clearly the State is not arguing that all of Jones' cases would have been tried at the same time. There were separate complaints, and unless the DA successfully moved to join the actions for trial, there would be separate trials, and thus, separate prosecutions.

---

[2]See: thelawdictionary.org/prosecution/

Therefore, because there was a separate prosecution of Jones for each of the cases considered at sentencing; And because the entire complaints in the Burglary Tools case (16-CF-52) and the Radio Shack case (16-CM-761) were dismissed; Therefore, the clear statutory language in §969.03(5) requires that the bail monies deposited must be returned to the persons who deposited them, and can not be applied to restitution in distinct and separate cases.

**CONCLUSION**

For all of the reasons stated above, the defendant, James A. Jones, hereby requests that this court reverse the circuit court's order and remand these cases with directions that the $2,500.00 deposited on Jones' bond in case 16-CF-52, and the $200.00 deposited on Jones' bond in case 16-CM-761 be returned to the persons who made the deposit.

Dated this 27th day of July, 2019.

By:_____
William J. Donarski
Attorney for Defendant-Appellant
State Bar No. 1021567

Office Address:
Law Office of William J. Donarski
2221 South Webster Avenue, #166
Green Bay, WI 54301

(920) 339-5216

**CERTIFICATION ON FORMAT**

I hereby that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a Reply Brief produced using the following font:

> Mono spaced font: **Courier New** at 12 point font, which is 10 characters per inch; double spaced; 1.5 inch margins on left side and 1.0 inch margins on other 3 sides.

The length of the brief is 13 pages.

**CERTIFICATION OF ELECTRONIC FILING**

I hereby certify that I have submitted an electronic copy of this Reply BRIEF OF APPELLANT-DEFENDANT, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of July, 2019.


_____
WILLIAM J. DONARSKI
Attorney for Defendant-Appellant
State Bar No. 1021567

Law Office of William J. Donarski
2221 South Webster Avenue, #166
Green Bay, WI 54301

(920) 339-5216

**CERTIFICATION OF MAILING**

I, William J. Donarski, hereby certify that pursuant to §809.80(3), Stats., that I deposited in the United States mail for delivery to the Clerk, by first class mail, postage prepaid the **Reply Brief of Defendant-Appellant**, addressed to:

Clerk of the Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

I have enclosed ten (10) copies of this document to the Court of Appeals. I have also served by U.S. mail three (3) copies of the said document upon the Wisconsin Attorney General at the following address:

Robert G. Probst
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

I certify that the packages containing the said documents postage prepaid were deposited in the U.S. postal receptacle on this 27th day of July, 2019.

_____
William J. Donarski
Attorney for Defendant-Appellant
State Bar No. 1021567

2221 South Webster Avenue, #166
Green Bay, WI 54301
(920) 339-5216