

FILED
08-03-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2019AP000664 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent.

**APPEAL FROM THE ORDER DENYING TAJ STANDING, ENTERED IN
WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S.
HUBER PRESIDING**

APPELLANT TAJ'S SUPPLEMENTAL BRIEF

LEGAL ACTION OF WISCONSIN, INC.

Attorney Andrea K Rufo
State Bar No. 1063962
Attorneys for TAJ, Appellant

P.O. ADDRESS

LEGAL ACTION OF WISCONSIN, INC.
4900 SPRING ST. SUITE 100
RACINE, WI 53402
(T) 262.635.8836
(F) 262.635.8838
akr@legalaction.org

INTRODUCTION

On May 18, 2020 this Court filed an Order requesting that the parties respond to questions raised by the passage of Marsy's Law, a ballot initiative which amended Wisconsin Constitution Article I, Section 9m to constitutionalize and clarify existing victims' rights and to extend those rights to ensure more uniform protections for Wisconsin's crime victims. In this Court's Order, the Appellant TAJ was asked to provide a supplemental brief addressing this Court's questions 1, 2, 3, and 5. Those answers are as follows.

ARGUMENT

QUESTION 1

I. BASED ON EXISTING PRECEDENT, THE NEW AMENDMENT TO ARTICLE I, SECTION 9M OF THE WISCONSIN CONSTITUTION MUST BE APPLIED PROSPECTIVELY.

Under Wisconsin law, constitutional amendments which affect the “substantive law of the state” are applied prospectively unless the constitutional amendment clearly states that it is to be applied retroactively. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 22, 295 Wis. 2d 1, 30, 719 N.W.2d 408, 422. *See also Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 731, 150 N.W.2d 447, 453 (1967) (“The established rule is that constitutional amendments which deal with the substantive law of the state are presumed self-executing in nature and *prospective in effect*.” (emphasis added)). The substantive law of the state includes constitutional law that dictates “rights, duties, status,

interests, and obligations of persons and entities.” *Substantive Law*, The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012).

Since a constitutional amendment affecting substantive law is not retroactive, issues that have already been litigated should be dealt with under the prior constitutional language. Issues that have yet to be litigated in ongoing cases should be addressed using the amended Article I, Section 9m of the Wisconsin Constitution. *Dairyland Greyhound Park*, 2006 WI at ¶ 22.

In this case, the amended Article I, Section 9m of the Wisconsin Constitution must be applied prospectively. On its face, the newly amended “Victims of crime” section of Article 1 clearly involves the substantive law of the state, constitutionalizing existing statutes that create rights; and extending and clarifying the rights implicit in Wisconsin Statutes Chapter 950. *See* Wis. Const. Art. I, §9m. The amendment contains no express language indicating that the amendment is intended to be retroactive. *See Dairyland Greyhound Park*, 2006 WI at ¶ 22 (“Because the 1993 Amendment is silent with regard to the issue of the pre-existing Tribal gaming compacts, the Amendment is not retrospective in operation.”).

Applying the newly amended Article I, Section 9m of the Wisconsin Constitution prospectively requires this Court to decide this case on the grounds argued in the parties’ original briefs. TAJ has argued extensively in previous filings, in which the State also concurred, that crime victims have standing under Wis. Stat. §950.105 to be heard orally

and in writing if they wish to oppose a defendant's *Shiffra-Green* motion.¹ TAJ now renews that argument. The plain language of Wis. Stat. §905.105 provides the necessary standing for TAJ to file motions and make legal arguments in response to this Defendant's motion.

II. WHETHER ARTICLE I, SECTION 9M OF THE WISCONSIN CONSTITUTION APPLIES RETROACTIVELY OR PROSPECTIVELY IN THIS CASE, THE RESULT IS THE SAME: TAJ HAS STANDING TO ARGUE AGAINST DEFENDANT'S *SHIFFRA-GREEN* MOTION ON REMAND FROM THE COURT OF APPEALS.

TAJ has standing to argue against the Defendant's *Shiffra-Green* motion on remand from the Court of Appeals regardless of whether Article I, Section 9m is found to apply retroactively or prospectively because legal authority already exists under Wisconsin Statute §950.105.

If this Court finds that the newly amended Article I, Section 9m of the Wisconsin Constitution applies prospectively, TAJ still has standing to be heard through his attorney, orally or in writing, on the Defendant's *Shiffra-Green* motion requesting TAJ's confidential and privileged mental health records. Mental and medical health records are protected by multiple statutes independent from whether the subject of those records is a

¹ TAJ notes that the defendant has not attempted to argue why Wis. Stat. §950.105 does not provide standing, depending instead on claims that *Jessica J.L. v. State*, 223 Wis.2d 622, 589 N.W.2d 660 (Ct. App. 1998) prohibits TAJ and other victims from arguing, themselves or through their attorneys, against a defendant's *Shiffra-Green* motion. For the reasons set out in the answer to Question 2 and TAJ's previous filings, that argument lacks merit.

crime victim or not.² The subject of mental health records thus has a statutory right to have their records protected.³

Additionally, Wis. Stat. §950.04(1v)(ag) creates a more general right of “privacy” for crime victims. Crime victims who are the subject of mental health records thus have an additional legal right to have their mental health records protected. Wisconsin Statute §950.105 creates “a right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution.” As these statutes make clear, crime victims have a legally protected interest in their right to privacy and their ability to enforce that right.

The new Article 1, Section 9m of the Wisconsin Constitution further protects and clarifies a victim’s right to standing by constitutionalizing that right. Section 9m(2)(i) gives a victim the right “to be heard **in any proceeding** during which a right of the victim is implicated.” (emphasis added). The listed rights in Section 9m(2) are expressly intended to “protect victims’ rights to justice and due process.” These due process rights afford not just the right to timely notice but the right “to be heard” in a meaningful way to protect any right under the “law.” Wis. Const. Art. I, §§9m(2)(g), (2)(i), (4)(a).

Finally, Section 9m(4)(a) explicitly includes a victim’s right to be represented by counsel in order to assert, protect, and seek remedy for violations of their rights, while

² Psychological treatment records are confidential under Wis. Stat. §146.82(1) and privileged under Wis. Stat. §905.04(2).

³ Under Wis. Stat. §905.04(2), the subject of the mental health records has the “privilege to refuse to disclose and to prevent any other person from disclosing confidential communications.” Under Wis. Stat. §146.82(1), “[a]ll patient health care records shall remain confidential,” and may only be released to the subject of the records, to others with the informed consent of the subject of the records, or under a limited set of circumstances laid out in Wis. Stat. §146.82(2), none of which apply here.

Section 9m(2)(b) establishes that a victim has a constitutional right to privacy. Both independently, and taken together, these constitutional provisions make it clear that a victim's rights necessarily include the right to be heard through counsel against *Shiffra-Green* motions, because these motions attack the very heart of a victim's privacy rights in his or her protected mental health records.

QUESTION 2

I. THE AMENDED ARTICLE I, SECTION 9M OF THE WISCONSIN CONSTITUTION ABROGATES *JESSICA J.L. V. STATE*.

When the Wisconsin Constitution is amended, the amendment or amendments automatically repeal inconsistent statutes and abrogate case law that conflicts with the Constitution. *See, e.g., Kayden Indus.*, 34 Wis. 2d at 731 (“the established rule is that constitutional amendments . . . repeal inconsistent statutes and common law which arose under the constitution before the amendment.”). Because *Jessica J.L. v. State (In re Jessica J.L.)*, 223 Wis.2d 622, 589 N.W.2d 660 (Ct. App. 1998) is inconsistent with the amended Article I, Section 9m of the Wisconsin Constitution, it was abrogated on May 4, 2020⁴ when the amendment became part of the supreme law of Wisconsin.⁵

⁴ Wis. Elections Comm’n., April 2020 Spring Election and Presidential Preference Primary Results (2020), <https://elections.wi.gov/node/6855>.

⁵ TAJ reiterates and reincorporates his earlier argument, with which the State agreed, that *Jessica J.L.* was abrogated when the Legislature passed Wis. Stat. §950.105, providing victims standing to enforce their rights independent from the State. The only reasonable statutory interpretation of Wis. Stat. §950.105 is to provide victims a right to be heard and object to a *Shiffra-Green* motion to protect their rights as a victim, their right to privacy, and their right to protection of privileged and confidential records.

To review, the Court in *Jessica J.L.* held, without any reference to then existing crime victims' rights laws, that a juvenile victim could not object, through a Guardian ad Litem, to the State's decision to waive the materiality hearing of the Defendant's *Shiffra* motion because such proceedings were "part of his prosecution . . . [and] a guardian ad litem or counsel for a victim in an alleged sexual assault may not participate in the criminal prosecution of the defendant." 223 Wis. 2d at 630. The Court in *Jessica J.L.* implied that any trial court question that may impact prosecutorial strategy or choices was "part" of the prosecution and that a crime victim could not be heard on the issue without violating the authority of the prosecutor. *Id.*

The holding in *Jessica J.L.* is contradicted by the newly amended Wisconsin Constitution. Under Section 9m(2)(i), a crime victim has the constitutional right "to be heard in any proceeding during which a right of the victim is implicated." "Any" proceeding is not qualified with any language that creates exceptions for proceedings in which the prosecution also seeks a particular result for strategic reasons. A victim filing motions or making legal arguments under the new amendment does so not for the purpose of prosecution or in any relation to a defendant's guilt. Rather, a victim has constitutional authority to be heard in hearings that implicate their rights. The new amendment is clear that crime victims are not made parties to the case, and TAJ has ever asked to for such status. The new amendment recognizes that a crime victim does not need to be a party to an action to have their rights implicated by actions in a case, and as such they do not need to be a party to be given standing to protect said rights.

A crime victim's rights are limited to situations that implicate and violate their protected rights. A *Shiffra-Green* motion violates not only numerous statutory rights but a victim's constitutional right to privacy. Thus, a crime victim has constitutional authority to be heard and to make legal arguments in opposition to a *Shiffra-Green* motion in order to protect those rights. Doing so does not make them part of the prosecution any more than it deprives defendants of their right to file such motions.

Section 9m(2) requires courts to protect a victim's due process rights, which includes the right "to be heard" in a meaningful way, such as through victim's counsel. Section 9m(4)(a) confirms a victim's right to be represented by counsel in order to assert, protect, and seek remedy for violations of their rights. Because a court could not apply *Jessica J.L.* in a case where a victim and prosecutor disagreed over whether to contest a *Shiffra-Green* motion or sought to apply different legal analyses without violating the Wisconsin Constitution *Jessica J.L.* is abrogated.

QUESTION 3

- I. WHILE THE AMENDED ARTICLE I, SECTION 9M OF THE WISCONSIN CONSTITUTION MAY ABROGATE OR MATERIALLY AFFECT PORTIONS OF CHAPTER 950 AND OTHER LAWS, THE AMENDMENT DOES NOT ABROGATE OR MATERIALLY AFFECT THE INTERPRETATION OF WISCONSIN STATUTE §950.105.**

The interpretation of constitutional amendments has the same basic purpose and employs the same basic methodology as ordinary statutory interpretation with a slight twist: there are two sets of intent to be considered, the intent of the legislature, and the

intent of the people. As such, it is sometimes necessary to consider not just the purpose of the specific language used, but also the intent that governs the whole.

As the purpose of construction of an amendment is to give effect to the intent of the framers and the people who adopted it, a paramount rule of constitutional construction is that the intent of the provision "is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole[.]" *Kayden Industries*, 34 Wis. 2d at 730. "[W]hen the intent of the whole is ascertained, no part is to be construed so that the general purpose [is] thwarted, but the whole is to be made to conform to reason and good discretion." *Id.* (citation omitted). We therefore next examine the history surrounding the passage of the 1993 Amendment. In our historical analysis of the 1993 Amendment, we examine the legislative debates and the ratification campaign. See *Schilling*, 2005 WI 17, 278 Wis. 2d 216, P16, 692 N.W.2d 623. *Dairyland Greyhound Park*, 2006 WI at ¶24.

The amendment popularly known as Marsy's Law is relatively long and complex. It potentially impacts a number of state laws and statutory provisions which may mean that courts will have to carefully consider the full intent and impact of the new Article I, Section 9m in future cases. That is not true in this case, however.

The plain language of the amendment and the general purpose of the amendment strongly supports the conclusion that Marsy's Law was intended to clarify and constitutionalize victim standing rather than abrogate any existing provisions for asserting rights in the Circuit Court.

Wisconsin has a legislative history of expanding the rights of victims of crime starting with the early adoption of constitutional protections for victims. The Wisconsin legislature continued that history in the amendment introduced in 2017. Wisconsin legislators removed limiting language from the national Marsy's Law movement proposed language – expanding certain rights from applying to “court proceedings” to

include “proceedings” without explicit limits. In a 2017 news conference associated with the introduction of the proposed amendment, then Attorney General Brad Schimel stated “we’re really not talking about giving new rights to crime victims ... We’re talking about the stature they’re given in the courtroom.”⁶

The general purpose of the whole as far as the voters’ intent can be summarized by the ballot question itself:

Additional rights of crime victims. Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

Attorney General Josh Kaul, *Explanatory statement for proposed constitutional amendment* (February 27, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Esigned_Marsy%27s%20Law%20explanatory%20statement_02%2027%202020.pdf.

Whatever else voters and legislators agreed on, they clearly intended to constitutionalize existing victims’ rights, thus placing them on an equal level with defendants’ rights when possible, and to guarantee that crime victims could enforce their rights in court. That intent is reflected in the plain language of Article I, Section 9m(4)(a) which states:

In addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law, the victim, the

⁶ Todd Richmond, *Wisconsin proposal would give crime victims a host of rights*, Fox11News (April 4, 2017), <https://fox11online.com/news/crime/wisconsin-proposal-would-give-crime-victims-a-host-of-rights>.

victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by law. **The court or other authority with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim. The court or other authority with jurisdiction over the case shall clearly state on the record the reasons for any decision regarding the disposition of a victim's right and shall provide those reasons to the victim or the victim's attorney or other lawful representative. (emphasis added).**

Section 9m(4)(a) makes it clear by the inclusion of "in addition to" that the new amendment does not intend to abrogate any existing statutory avenues for victims to assert their rights in circuit courts. Rather, the amended Section 9m(4)(a) creates a floor for victims' rights, which may be built upon by other rights afforded to victims in the Constitution or other applicable statutes. The new amendment constitutionalizes pre-existing victim's rights in Wisconsin. Specifically, the right to be heard by a judge in a court that has jurisdiction; the right to be heard through victim counsel; the right to speedy hearing; the right to a remedy if appropriate; and the right to a decision based on the appropriate facts and law. *See* Wis. Stat. §§950.04, 950.105. Nothing in this clarification of the constitutionally required process for a proceeding involving a victim rights' challenge contradicts or conflicts with Wisconsin Statute §950.105 which creates an explicitly statutory, rather than common law, right to standing.

The intent of the legislature and the amendment as a whole is clearly not to limit, complicate, or undermine victim standing, but to make it easier for victims to enforce

their own rights in court. The new amendment recognizes the need to make legal arguments, the potential need for appeal motions, and the general right of victims to assert legal positions through oral or written argument, by specifically adding reference to a victim's ability to be heard through their own attorney or other lawful representative. In doing so, Section 9m(4)(a) clarifies what was presumed in Wis. Stat. §905.105: that a victim who has standing to assert their rights would also be entitled to seek out counsel for assistance in filing motions, or making oral arguments in court. Section 9m(4) states that the rights listed to assist victims are listed "in addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges or protections provided by law," allowing victims an even broader approach to means by which to assert and enforce their rights. The new amendment not only validates Wis. Stat. §950.105 but emphasizes it, and the standing it confers, as a continued legal option for protecting victims.

There is no reasonable interpretation or basis to argue that any of the provisions of the new amendment abrogate or adversely affect Wisconsin Statute §950.105, thus TAJ has standing to be heard, through oral and written argument, on the Defendant's *Shiffra-Green* motion under both state statute and the Wisconsin Constitution.

QUESTION 5

I. NEITHER THE AMENDED ARTICLE I, SECTION 9M OF THE WISCONSIN CONSTITUTION NOR WISCONSIN STATUTE §950.105 MAKE TAJ'S STANDING DEPENDENT UPON WHETHER THE STATE AGREES WITH THE VICTIM'S LEGAL ARGUMENTS.

Section 9m and Wisconsin Statute §950.105 provide victims standing to enforce their rights in a criminal case, independent of the State's position on the same issue affecting the victims' rights. Even where both a victim and the State oppose a defendant's motion, including a *Shiffra-Green* motion, a victim still has the right to be heard in a meaningful way.⁷

As TAJ has argued above, the amended Article I, Section 9m makes clear that a victim's rights to their own counsel and to be heard in a meaningful fashion are guaranteed by the Constitution.

Compared to the previous Section 9m(2), the State is noticeably removed from the new amendment's wording. Throughout the amendment, it is made clear that the State is not the entity tasked with asserting a victim's rights. The State may assist a

⁷ Trial courts retain their inherent authority to control their courtroom, and they are not obligated to give victim counsel unlimited time to repeat or make oral arguments already made by the State. But, as any experienced litigator knows, the fact that two people take the same general position does not mean they are making the same arguments based on the same formulations of the legal standard. Individuals who are intervening to protect their interests in any case to which they are not a party are not prohibited from making their arguments on a motion to dismiss simply because one of the parties is also opposing the motion; standing is about the right to protect your own interests not the possibility that someone might protect them for you, indirectly. *Wisconsin Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, 69 Wis.2d (1975).

victim with asserting their rights in a particular context, but it must be done with the victim's consent and without the State's attorney violating his or her obligations as a prosecutor. And of course, where a victim has retained their own counsel, the State's actions, even in supporting the victim's rights, exist independent from the representation the victim receives.

In arguing against any motion, it is not the simple objection that counts but rather the argument and legal authority set forth to support that objection. Because the State and the victim are in different positions in a case and may have different motives, it is highly unlikely that they would provide identical legal arguments in support of their opposition. Specifically, the State is focused on the prosecution of a defendant, while a victim is focused solely on protecting their implicated rights. With a *Shiffra-Green* motion, for example, victims may focus on the importance of their privacy and the impact the motion has on their confidentiality and treatment. The State may focus on whether a defendant has met its legal burden under case law for *in camera* review. A judge may find one side's reasons compelling but not the other's; or a judge may be persuaded by the combination of arguments when one of the motions alone would not have been enough. To deprive victims of the opportunity to make their unique arguments simply because they want the same outcome as the State is to deprive them of what our state constitution now requires: "a meaningful opportunity" to be heard in any proceeding that implicates their rights under the law.

Furthermore, the Court's question identifies a practical problem. If the key issue is that the victim and the State both believe that a court should deny a *Shiffra-Green*

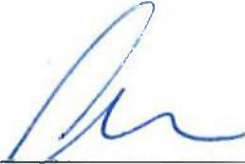
motion, how do the parties go about making this determination? Must the State contact the victim? If the victim is unrepresented will the State be required to discuss legal strategy or give legal advice to a victim, despite being ethically prohibited from doing so? If the victim is represented, would the State have to reach out to victim's counsel and discuss legal strategies? What would happen if victim counsel and the State disagreed on how to argue the motion? Would a defendant's counsel be rightly concerned that the victim's counsel was improperly assisting the State in prosecution by sharing their arguments for objection?

Conditioning a victim's ability to be heard on a defendant's motion on whether the State took the same position would be ridiculous given that no such condition is placed on victims in other contexts. No one suggests that a victim would be precluded from providing a sentencing statement or information for a PSI if they happen to agree with the State on the appropriate penalty for a defendant. It is not the similarity of the statement or position that is determinative of whether a victim can be heard. Rather it is the rights provided and the specific issues relevant to the victim that matter.

Under both Chapter 950 and the Wisconsin Constitution, victims have the right to present their position on issues implicating their rights regardless of the State's position. To deprive a victim of their right to be meaningfully heard because the victim and the State are merely seeking the same outcome would violate both state law and the state Constitution.

Dated this 31st of July 2020.

Respectfully submitted,



LEGAL ACTION OF WISCONSIN
ATTORNEYS FOR TAJ
ANDREA K RUFO
State Bar No. 1063962

Legal Action of Wisconsin, Inc.
4900 Spring St., Suite 100
Racine, WI 53406
(T) 262.635.8836
(F) 262.635.8838

CERTIFICATION OF FORM/LENGTH

Andrea K Rufo herein certifies that this motion meets the form and length requirements of Wis. Stat. §809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the brief is 3,936 words.

Dated this 31st day of July 2020.



Andrea K Rufo

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

Andrea K Rufo herein certifies the following:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on this date. A copy of this certificate has been served along with (10) paper copies of this brief with the court and (3) paper copies of this brief to all attorneys of record.

Dated this 31st day of July 2020.



Andrea K Rufo

CERTIFICATION OF SERVICE

I, Andrea K Rufo, herein certify that I am employed by Legal Action of Wisconsin, which is located at 4900 Spring St., Suite 100 Racine, WI 53402 and that on the 31st day of July, 2020, I sent 10 copies each of Appellant TAJ's Supplemental Brief by FedEx Priority to the Office of the Clerk of the Court of Appeals at 110 E. Main St., Suite 215 Madison, WI, 53707.

I hereby certify that three (3) copies each of the same Appellant TAJ's Supplemental Brief were on mailed by FedEx Priority on this 31st day of July, 2020, securely enclosed, the postage prepaid, and addressed to the following:

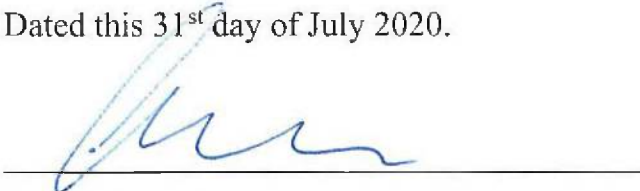
Plaintiff-Respondent at:

Attorney Sarah L. Burgundy
State of Wisconsin
Department of Justice
17 W Main St.
P.O. Box 7857

Defendant-Respondent at:

Attorney Nathaniel Wojan
1650 Midway Road
Menasha, WI 54952

Dated this 31st day of July 2020.



Andrea K Rufo

