STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP664

STATE OF WISCONSIN,
Plaintiff-Respondent,

T.A.J,
Appellant,
v.

ALAN S. JOHNSON,
Defendant-Respondent.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal From the Order Denying TAJ Standing, Entered in Waupaca County Circuit Court, the Honorable Raymond S. Huber Presiding

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BRIEF ANSWER TO QUESTIONS ASKED

1. Do the recent amendments to the Constitution apply in a criminal case, such as the case that is the subject of this appeal, that was commenced prior to the effective date of the recent amendments to the Constitution and in which the pertinent issue was litigated in the circuit court prior to the amendments?

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") takes no position on this issue.

2. Does any recent amendment to the Constitution abrogate the holding of ***Jessica J.L.*** regarding the lack of standing of a victim to oppose a ***Shiffra-Green*** motion made by a

defendant in a criminal case? *See* ***Jessica J.L. v. State***, 223 Wis.2d 622, 626, 630, 589 N.W.2d 660 (Ct. App. 1998).

The recent amendments to Article I, § 9m of the Wisconsin Constitution of abrogate the holding of ***Jessica J.L.*** only to the extent that they grant standing to a victim to oppose a ***Shiffra-Green*** motion in the *circuit* court. The recent amendment does not grant standing to a victim to appeal decisions in criminal court proceedings that they view as adverse and grants no standing to participate as a party in the criminal appeal. Under the recent amendment, the remedy for victims who seek review of an adverse decisions of a circuit court concerning their rights is to limited to filing a supervisory writ in the appellate court.

3. Does any recent amendment to the Constitution abrogate, or affect in any way material to this appeal, the interpretation of Wis. Stats. § 950.105?

No recent amendment to the Constitution affects the interpretation of § 950.105. Section 950.105 provides a limited form of standing in the circuit court, but not in the appellate courts, for victims to assert their rights. But the recent amendment did expand the rights of victims to include the right, upon request, to be heard in the circuit court at any proceeding during which a right of the victim is implicated, including a proceeding concerning a ***Shiffra-Green*** motion.

5.[1] In a criminal case in which the State and a victim both oppose a discovery request made by a defendant, such as a ***Shiffra-Green*** motion, does the victim have standing to assert his or her position regarding that discovery request to the court in writing and at a hearing in *addition* to argument made by the State?

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[1] This section contains no question #4 because this Court addressed question #4 only to the State of Wisconsin.

Victims in a criminal court proceeding in the circuit court have a role akin to that of amicus curiae when they are entitled to be heard, except that allowing them that role is mandatory, not discretionary. As a matter of right, they get one opportunity to state their position on each issue on which they have a right to be heard, regardless of the position the state takes. Whether that participation is oral or written should rest in the discretion of the circuit court.

ARGUMENT

Wisconsin law, including the recent amendments to Article I, § 9m, of the Wisconsin Constitution, grants no standing to a victim on appeal. Although victims have standing to assert their rights at the circuit court level, they may not litigate as though they were parties and their participation in the circuit courts is akin to the participation of nonparty amicus curiae in the appellate courts.

Victims control the release of their medical records in criminal cases. No one disputes that victims have a right to refuse to release their medical records. *See* ***State v. Shiffra***, 175 Wis.2d 600, 609, 499 N.W.2d 719 (1993). They continue to have this right and control regardless whether a defendant requests them and meets the preliminary burden of demonstrating "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence" that is not cumulative. *See* ***State v. Green,*** 2002 WI 68, ¶¶ 19, 34, 253 Wis.2d 356, 646 N.W.2d 298. Nor does their refusal to release those records necessarily result in a dismissal of the case against the defendant, although it will result in those victims being precluded from testifying. *See* ***Shiffra***, 175 Wis. 2d at 609.

The question here therefore is not whether victims retain

control over their own medical records. Instead, the question is what the role of victims is in the process which leads to them being asked to release their medical records when necessary to protect the defendant's right to a fair trial. The answer depends on the whether the case is on appeal or in the circuit court. Victims have no direct role in appellate review of any aspect of appeal of the criminal case regardless whether ***Jessica J.L. v. State***, 223 Wis.2d 622, 626, 630, 589 N.W.2d 660 (Ct. App. 1998), Wisconsin Statutes § 950.105, or Article I, § 9m of the Wisconsin Constitution (2020) applies. They cannot commence an appeal and are limited to seeking a supervisory writ to enforce their rights. As for the victim's role in the circuit court, the right of a victim to be "heard in any proceeding during which a right of the victim is implicated" in the circuit court (which is set forth in Article I, §9 m(2)(i) (2020) and, to some extent, in Wisconsin Statutes § 950.105) creates a role in the circuit courts akin in many ways to that of an amicus curiae.

A. Victims have no direct role in the appeal of a criminal case regardless whether this Court applies *Jessica J.L.*, Wisconsin Statutes § 905.105, or the recent amendments to Article I, § 9m of the Wisconsin Constitution.

Victims have no standing on appeal to oppose a defendant's ***Shiffra-Green*** motion or any other defense motion. ***Jessica J.L.***, 223 Wis.2d at 630-32, holds victims have no standing to litigate ***Shiffra-Green*** motions in the circuit court and are restricted to stating their opposition to the state which is then required to oppose the motion. If victims have no standing in the circuit court then they have no legally protectible interest that

would give them standing on appeal. Section 950.105, which was enacted approximately thirteen years after the decision in ***Jessica J.L.***, *see* 2011 WI Act 283, provides standing to a victim "to assert …his or her rights," but only in the circuit court. Article I, § 9m (2020) is even clearer that a victim has no right to standing on appeal and that a victim's remedy for violation of his or her rights in the circuit court is by supervisory writ, not appeal.

A strong desire to be heard is not enough to create standing. ***In re Adoption of J.C.G.***, 177 Wis.2d 424, 427, 501 N.W.2d 908 (Ct. App. 1993). Instead, standing requires "a direct effect upon a legally protected interest" and whether that interest is legally protected in a particular circumstance may turn on the statutes and provisions involved. ***Id.*** Thus, for example, grandparents who have a great stake in their grandchildren but they have no standing to appeal an adoption order if they have no statutory right to bring an action for custody of their grandchildren. ***Id***.

In the criminal realm, courts have been reluctant to grant standing to nonparties and have done so only when the order involved had only a tangential relationship to the criminal proceedings and involved money. So, for example, the courts have granted sureties standing with regard to bail forfeiture orders, *see* ***State v. Iglesias,*** 185 Wis.2d 117, 517 Wis.2d 175 (1994); ***State v. Givens***, 88 Wis.2d 457, 463, 276 N.W.2d 790 (1979), and have granted a county standing with regard to who would pay experts' fees, ***In the Matter of Payment of Witness Fees in State v. Brenizer***, 179 Wis.2d 312, 507 N.W.2d 576 (Ct.

App. 1993).

Nevertheless, § 950.105 grants some limited standing to a victim but only to assert rights granted under either Wis. Stats. § 950.04 or the earlier version of Article I, § 9m, *see* Wis. const. art. I, § 9m (2017-18), and only in the circuit court. It provides, in relevant part:

> A crime victim has 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.

Section 950.105 did not abrogate ***Jessica J.L.*** because neither § 950.04 nor the earlier version of Article I, § 9m created a right to be heard during ***Shiffra-Green*** proceedings. Thet relevant portions of both were in effect when the Wisconsin Supreme Court decided ***Jessica J.L***. Compare 1993 J.R. 2 (Wis. const. art. I, § 9m (1993-1994)) and Wis. Stats. § 950.04 (1997-98) with Wis. const. art. I, § 9m (2017-18) and Wis. Stats. § 950.04. Section 950.04 does not specifically refer to ***Shiffra-Green*** motions and does not grant a right to be heard when they are made. While § 950.04 grants a victim the right to "attend court proceedings in the case," *id*. § 950.04(1v)(b) and the right upon request "to consult with the prosecution," *id*. § 950.04(1v)(j), it grants no right "to be heard in any proceeding" as Article I, § 9m(2)(i) (2020) does. The earlier version of Article I, § 9m also grants "the opportunity to attend court proceedings" and "reasonable protection from the accused" but grants no right to be heard. Wis. const. art. I § 9m (2017-18).

In addition, whatever standing § 950.105 grants is granted solely at the circuit court level. Thus, even if one assumes that § 950.04 or the original version of Article I, § 9m grants a right to be heard on ***Shiffra-Green*** motions, standing on appeal does not exist. The phrase"a court in the county in which the alleged violation occurred" refers to circuit courts. This Court has four districts, physically located in four different counties-Milwaukee, Waukesha, Dane, and Marathon—and restricting standing on appeal to those four counties would be strange.

The history of this provision supports this reading. As originally proposed, the provision allowed the exercise of a victim's rights in *any* court and read:

> A crime victim has a right, independent of the rights and duties of the crime victims rights board under s. 950.09, to exercise and assert in any court his or her rights as a crime victim under the statutes or under article I, section 9m of the Wisconsin constitution.

2011 AB 232. Assembly Amendment 1 to the bill changed the language to what it is today. *See* Assembly Amendment 1 to 2011 AB 232.

Moreover, the recent amendments to Article I, § 9m of the Wisconsin Constitution also do not grant standing in the appellate courts to enforce victims' rights. In interpreting a constitutional provision, the courts of this state examine: (1) its plain meaning in context; (2) the constitutional debates and practices at the time it was written, which the courts have understood to include the general history; and (3) "the earliest

interpretation of the provision by the legislature as manifested in the first law passed following adoption." ***Schilling v. State Crime Victims Rights Bd.***, 2005 WI 17, ¶16, 278 Wis.2d 216, 692 N.W.2d 623. The third does not yet exist here.

The plain meaning of the constitutional amendment expressly excludes a right to appeal to enforce a victim's rights in the circuit court, even though subsection (2)(i) grants a right to be heard upon request in the circuit court. Instead, the proper vehicle for vindication of victims' rights is a supervisory writ to this Court. Article I, § 9m(4)(b) (2020) expressly provides the route for review of and that path is not an appeal within the criminal court case. Article I, § 9m(4)(b) (2020) provides:

> (b) Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) **by filing a petition for supervisory writ in the court of appeals and supreme court.**

(emphasis added). By setting forth one procedure for enforcing victims' rights in the appellate courts, the constitutional language implicitly bars other procedures. Cf. ***State v. Dorsey***, 2018 WI 10, ¶29, 379 Wis.2d 386, 906 N.W.2d 158 ("Where a specific exception is made, it implies that no other exceptions are intended.")

Examining the general history of the provision leads to the same conclusion. The exclusion of the possibility of direct appeal did not occur because the legislature was unaware that the use of direct appeal to enforce victims' rights was possible. This

provision differs significantly from the Marsy's Law provision in the California Constitution on which the recent amendments were based. *See* Legislative Reference Bureau, Constitutional Amendment Relating to Crime Victims' Rights, 5 Reading the Constitution 1, 6 (2020) (found at https://docs.legis.wisconsin/gov/misc/lrb/reading_the_constitution/crime_victims_rights_amendment_5_1.pdf). Article I, §28 (17)(c)(1) of the California Constitution specifically allows victims, with or without attorneys, to enforce their rights to enforce their rights "in any trial or appellate court with jurisdiction over the case as a matter of right." By passing the other key provisions of the California Constitution provision on victims' rights while omitting this one, the Wisconsin legislature consciously chose not to grant the right to standing on direct appeal.

Victims have no standing in this Court or any other appellate court to appeal to enforce their rights, other than by seeking a statutory writ. They have no direct role in any criminal case on appeal no matter what law applies here.

B. The role of a victim under Wisconsin Statutes § 950.105 or the recent amendments to Article I, § 9m of the Wisconsin Constitution in the circuit court is similar to that of a nonparty amicus curiae at the appellate level except that the circuit court must allow their participation.

Although victims may have standing in the circuit court to enforce their rights, they are not parties. The passage of the recent amendments to Article I, § 9m does not change that analysis. Article I, § 9m(6)(2020) specifically states that § 9m "is

not intended and may not be interpreted…to afford party status in a proceeding to any victim." If victims are not parties, yet are to be heard at proceedings then what is their role? Their role is akin to that of amicus curiae, except that allowing them that role is mandatory, not discretionary, when they have a right to be heard.

The usual way for a nonparty to be heard is by becoming amicus curiae. The appellate courts in this state have a long history of dealing with nonparty amicus curiae and that history is instructive in setting the role for victims in the circuit court. Indeed, circuit courts in this state have some familiarity to amici as they occasionally have invited nonparties to serve as amici curiae in civil cases. *See, e.g.,* ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶32, 307 Wis.2d 1, 745 N.W.2d 1.

Although most nonparties in the appellate courts must file motions for permission to participate, *see* Wis. Stats. (Rule) 809.19(7)(a), sometimes, as in this case, the appellate courts solicit them and no motion is needed. In the case of victims, one way to look at their role is to consider them nonparties for whom the legislature and the people of the state have mandated a role and for whom no need exists to file a motion to participate. After all, "[a]n amicus curiae (amicus) is a nonparty with a strong interest in the subject matter of the case." Neal Nettesheim and Clare Ryan, Friend of the Court Briefs: What the Curiae Wants in an Amicus, 80 Wis. Lawyer 11, 11 (May 2007).

Amici, like victims in a criminal case, are not parties. *See* Friend of the Court Briefs at 12. Victims too are nonparties with

a strong interest in the subject matter of the case. In the circuit court, only the state and the defendant are parties. Only a district attorney or a properly-appointed special prosecutor can prosecute a criminal case. Wis. Stats. §§ 978.045, 978.05(1). The defendant is a party because the lawsuit is against him.

Like the nonparty amicus, the role of a victim is limited and specific. The victim's right to be heard is not a right to control the litigation. Other than motions related directly to the participation such as motions for extension of time to file a submission or motions to change the form of a submission by, for example, extending the page limit, "[a]n amicus cannot file motions or pleadings, manage the case, or raise issues the court has not agreed to review." *See* Friend of the Court Briefs at 13.

Similarly, because victims are not parties, they cannot be allowed to assume control of the controversy in adversarial fashion. They should not be able to file general motions or pleadings, except in the rare circumstances when statutes specifically grant the right to do so, *see, e.g.,* Wis. Stats. § 950.04(1v)(d) (allowing victims to seek orders for certain testing). They should not file pleadings or amend them. Victims should not seek discovery from the defendant or preemptively seek protective orders preventing a defendant from making a ***Shiffra-Green*** motion. The right to be heard at proceedings is generally a right to comment on issues already joined. *See generally* ***United States v. Michigan,*** 940 F.2d 143, 165-66 (6th Cr. 1991) (stressing the distinctions in federal civil law between amici and named parties).

Even more specifically, amici generally are limited in the manner of their participation, even in the issue that is relevant to them. In Wisconsin, as a matter of right, an amicus "may only file one brief." *See* Friend of the Court Briefs at 13; *see generally* ***Lassa v. Rongstad***, 2006 WI 105, ¶13 n.13, 294 Wis.2d 187, 718 N.W.2d 673 (noting that amici should not file their own brief and join another). Amici have no right in the appellate courts to file replies.

As for oral argument, amici have no right to oral argument. When they do a portion of the oral argument, that time for argument usually comes from the time of the party whose position is most closely aligned with them. Such an arrangement keeps the presence of an amicus from giving one party or another an unfair advantage.

Victims in the circuit court also should have only one opportunity as of right to state their position on each issue on which they have a right to be heard, but whether that participation is written or oral should be left to the discretion of the circuit court itself. The circuit court is in the best position to know the preferences of the victim and of the parties; whether any attorney represents the victim (as has occurred here); whether oral or written participation is more manageable for the parties; whether oral or written participation is more manageable for the court; and whether being forced to write rather than speak or speak rather than write puts an undue burden on the abilities of the victim. At the appellate level, amici file briefs and are not entitled to participate in oral argument. *See*

Friend of the Court Briefs at 12. For a victim, who likely will not be represented by counsel and may not have the ability to participate in writing, oral participation rather than written participation may be more appropriate in a given situation. If a circuit court, in its discretion, allow both oral and written participation, the circuit court also should consider whether such participation should limit either the time for argument or the pages for written argument that the state has in a particular circumstance.

CONCLUSION

WACDL therefore asks that this Court hold that victims have no standing on appeal in criminal cases. WACDL also asks that this Court hold that, when victims have the right to an opportunity to be heard in the circuit court, their role is akin to that of amicus curiae, except that allowing them that role is mandatory, not discretionary.

Dated at Milwaukee, Wisconsin, June 22, 2020.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 3,309 words.[2]

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Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Ellen Henak

[2] This Court's order of May 18, 2020, created a word limit for this brief of 4,000 words.

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 3rd day of August, 2020, I caused 10 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Ellen Henak

Johnson, A. WACDL Amicus Brief.wpd