State of Wisconsin
Supreme Court
Appeal No. 2019AP000886-CR

State of Wisconsin,

Plaintiff-Respondent-Respondent,

v.

Chidiebele Praises Ozodi,

Defendant-Appellant-Petitioner.

Petition for Review of an Opinion of the Wisconsin Court of Appeals, District 2, Dated December 16, 2020

Petitioner's Petition and Appendix

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Petition

Now comes the above-named petitioner, by his attorney, Jeffrey W. Jensen, and pursuant to § 809.62, Stats., hereby petitions the Wisconsin Supreme Court to review this matter.

As grounds, the undersigned alleges and shows to the court that the issue presented is not settled under existing law, it is a substantial question of state and federal constitutional law, and it is likely to recur throughout the state.

Statement of the Issue

The petitioner, Ozodi, was severely, but voluntarily, intoxicated at the time he allegedly committed the crimes charged in the information.

Prior to 2014, the law provided that intoxication-- both voluntary and involuntary-- was an affirmative defense to a criminal charge if the degree of intoxication was such that it rendered the defendant incapable of forming an essential state of mind. In 2014, the legislature amended the statute to eliminate any reference to voluntary intoxication. Under the current version, then, only *involuntary* intoxication is specifically an affirmative defense.

Here, over Ozodi's objection, the judge instructed the jury that Ozodi's intoxication was not "by itself" a defense to the

charge.

Thus, the issues presented are:

(1) May the jury consider evidence of voluntary intoxication insofar as it may create a reasonable doubt as to whether the defendant formed the requisite state of mind? In other words, did the circuit court's instruction mis-state the law?

(2) Did the instruction violate Ozodi's due process right to present a defense?

Answered by the circuit court: The instruction correctly stated the law. Ozodi's right to present a defense was not violated.

Answered by the court of appeals: The court of appeals conceded that the law is not settled concerning the effect of the 2014 amendment to the statute. However, the court of appeals declined to develop the law because, under the totality of the circumstances, the court found that the jury was aware that it could consider Ozodi's intoxication insofar as it bore upon his state of mind.

The issue was presented to the court of appeals as follows: "Whether the circuit court erroneously exercised its discretion, and denied Ozodi his constitutional right to present a defense, where the judge instructed the jury that, "a defendant's voluntary intoxication is not by itself a defense."

Statement of the Case

I. Procedural History

The petitioner, Chidiebele Ozodi (hereinafter "Ozodi"), was charged in a criminal complaint filed in Walworth County on October 24, 2016 with attempted second degree sexual assault, operating a motor vehicle without owner's consent, and disorderly conduct. (R:2) The charges arose out of an incident that occurred on October 4, 2016 in the City of Whitewater. In a nutshell, the complaint alleged that Ozodi was severely intoxicated on L.S.D. and, perhaps, other substances. He was observed walking, naked, through the U.W.-Whitewater campus by another young woman, Andrea[1], who offered him some shorts and a T-shirt to wear. After a brief conversation, according to the complaint, Ozodi said something to the effect that he was going to have sex with Andrea, and he pushed her to the ground. At that point another man knocked Ozodi off of Andrea. The complaint also alleged that Ozodi drove a friend's car without consent, and that he was vulgar and disorderly at the hospital.

Ozodi waived his preliminary hearing. (R:67-3) The state filed an information that mirrored the charges in the criminal complaint. Ozodi entered not guilty pleas to all three charges.

[1] This is a pseudonym as required by § 809.86(4), Stats.

(R:68-2)

There were no substantive pretrial motions.

The case proceeded to jury trial beginning on January 29, 2019.

Ozodi testified at trial. He told the jury that he had little recollection of any of the events alleged in the complaint.

The court conducted several jury instruction conferences. The state requested that the court read an instruction that, in part, told the jury that, “Voluntary intoxication of any witness may be relevant evidence and may have bearing on the credibility of that witness. However, a defendant’s voluntary intoxication is not a defense and cannot be used to show that the defendant lacked the necessary knowledge to commit the alleged offense(s) or that the defendant did not intend to commit the alleged offense(s).” (R:18) The defense objected, and argued that Ozodi should be able to argue to the jury that-- although it is not a complete affirmative defense-- voluntary intoxication is relevant evidence as to whether or not he intended to commit the crime, and whether he knew that Andrea did not consent to having sex. (R:72-223; R:73-5, 6))

The court ruled that it would give an abridged version of the instruction that the state requested. Specifically, the judge said, “I'm going to read the instruction as it's written up until that point, and it will read as follows: however, a defendant's voluntary intoxication is not by itself a defense period.“ (R73-12,

13)

Thus, the final instruction to the jury was as follows: "Evidence has been presented which if believed by you tends to show that the defendant was voluntarily intoxicated at the time of the alleged offenses. Voluntary intoxication of any witness may be relevant evidence and may have bearing on the credibility of that witness. However, a defendant's voluntary intoxication is not by itself a defense." (R:73-117)

The jury returned verdicts finding Ozodi guilty of all charges. (R:73-154)

The court sentenced Ozodi to five years probation, with six months in jail as a condition. (R:74-19; R:50).

Ozodi timely filed a notice of intent to pursue postconviction relief. He then filed a postconviction motion alleging that Wis. JI-140 misstated the law concerning the meaning of "reasonable doubt." (R:59) The court denied that motion on April 30, 2019. (R:98)[2]

Ozodi appealed. On appeal he argued that the circuit court misstated the law when it instructed that jury that "[A] defendant's voluntary intoxication is not by itself a defense." Further, Ozodi argued on appeal that the erroneous instruction denied him his constitutional right to present a defense.

The court of appeals affirmed. The court of appeals acknowledged, though, that "[T]he interpretation of the statutory

[2] Due to the Supreme Court's decision in *State v. Trammell*, 382 Wis. 2d 832, 917 N.W.2d 233 (2018), Ozodi does not raise this issue on appeal.

change deleting voluntary intoxication as well as related due process considerations is undeveloped in our case law . . .” (Ct. App. opinion p. 12) The court of appeals declined to further develop the law. Rather, the appeals court pointed out that, during the trial, there was significant evidence presented about Ozodi’s intoxication, and “rulings made clear that voluntary intoxication was relevant and the jury was to consider all the facts and circumstances . . . . and that Ozodi was not precluded from . . . [arguing] that his intoxicated state negated his ability to form the requisite intent to commit the crimes charged.” (Ct. App. opinion p 15).

Thus, the court of appeals concluded, “We do not see a reasonable likelihood that a jury could be confused or led to believe by the instructions that it was not allowed to consider the evidence that Ozodi did not intend to commit the offenses—his intent was a focal point of the testimony and of the arguments on both sides at trial.” *Id.*

II. Factual Background

According to Ozodi’s friend Arthur[3], one afternoon they took acid (L.S.D.) and smoked marijuana at Arthur’s apartment. (R:72-205) Athur was having a bad trip so he went into the bedroom with his girlfriend. (R:72-206)

[3] This is also a pseudonym since, arguably, Arthur is a victim of the charge of operating auto without owner’s consent.

Despite having his own car outside the apartment, Ozodi apparently then took Arthur's car and drove off (R:72-206). Arthur began receiving text messages from various people to the effect that Ozodi had crashed Arthur's car into a tree in the UW-Whitewater parking lot. (R:72-206) Ozodi testified that he had no recollection of taking the car or of crashing it. (R:73-68)

Witnesses said that, after the crash, Ozodi got out of the car, and was approached by Andrea, who offered him some shorts and a t-shirt. (R:72-173) According to Andrea, it was pretty apparent that Ozodi was not in a normal state of mind. He was very agitated and very paranoid. (R:72-174) Ozodi put the clothes on, and then he told Andrea that he was "tripping on acid" and he asked her if she was God. (R:72-175). He told her he was going to have sex with her, he pushed her to the ground, and then he tried to get on top of her. *Id.* A male rugby player pushed him off. (R:72-175) Ozodi then ran off.

Significantly, Andrea testified that Ozodi never actually had contact with any of her intimate parts. (R:72-18) Ozodi was still wearing the clothes he had put on. *Id.*

Ozodi was later found by officers masturbating in the middle of a sports field at UW-Whitewater. (R:72-125)

The state presented evidence that Ozodi's blood was positive for THC, the active ingredient in marijuana, but that it is not possible to test for LSD. (R:73-20, 22, 23) Concerning the effects of LSD, an expert witness from the State Laboratory of

Hygiene, Stephanie Weber, told the jury that, “As far as psychological impact. . . essentially this category of drugs will alter a person's perception of reality. So this can be a perception of time. It can be a perception of what's actually happening around you. So after ingesting LSD someone may sense that time is moving much slower than it actually is or it could speed up . . . This category of drugs can also have impact on what people see. So it can cause visual hallucinations in that a blank wall to them may have objects moving on it or objects might be morphing into each other whereas in reality they're not doing that, obviously. So this drug basically will completely change someone's perception of reality and what is happening around them.” (R:73-24, 25)

Discussion

I. The supreme court should review this matter in order to develop the law concerning the effect of the legislature's removal of "voluntary intoxication" as an affirmative defense; and the due process implications of the amendment.

Until April, 2014, the law in Wisconsin was that both voluntary and involuntary intoxication was an affirmative defense to a criminal charge if the intoxication, "Negatives the existence of a state of mind essential to the crime . . ." § 939.42(2), Stats. (2011-2012).

However, effective April 17, 2014, the legislature amended the statute so as to remove any reference to voluntary intoxication. Currently, the statute provides that only involuntary intoxication is an affirmative defense if it, "Negatives the existence of a state of mind essential to the crime." § 939.42(2), Stats.

This amendment to the statute is the source of the controversy in this case. Before the circuit court, the state took the position that, in light of the amendment, the jury may not even consider voluntary intoxication insofar as it relates to the defendant's intent. According to the state, the evidence of Ozodi's intoxication is relevant only to the credibility of his testimony.

Ozodi, on the other hand, argued that the amendment of the statute merely removed voluntary intoxication as an *affirmative defense*. That is, a defense that the state must negate beyond a reasonable doubt if the defendant produces enough evidence to raise it as an issue.

As both the circuit court and the court of appeals noted, "[T]he interpretation of the statutory change deleting voluntary intoxication as well as related due process considerations is undeveloped in our case law." (Ct. App. opinion p. 12)

The court of appeals declined to develop the case law; but the supreme court should do so.

The court of appeals reasoned that it was not necessary to address the interpretation of the statutory change in this case because, under the totality of the circumstances, the jury was well aware that it could consider Ozodi's level of intoxication insofar as it bore on his intent to commit the crimes. The court of appeals was confident that there was no reasonable likelihood that a jury was confused or led to believe by the instructions that it was not allowed to consider whether Ozodi's intoxication prevented him from forming the intent to commit the crimes. Thus, the court of appeals concluded, "[W]e do not agree with Ozodi's suggestion that there existed a reasonable likelihood that the jury understood the instruction to relieve the State of its burden of proof as to a statutory element—that the jury would believe that if Ozodi was intoxicated, he was

criminally responsible for what followed regardless of his intent." (Ct. App. opinion p. 16)

Ozodi is not so confident; and neither should the supreme court be confident.

True, there was plenty of evidence presented concerning Ozodi's level of intoxication; and his lawyer was allowed to argue that Ozodi never formed the intent to have sexual contact with Andrea.

Nevertheless, the judge told the jury that "intoxication by itself is not a defense". In other words, although the evidence of intoxication was presented, *the jury was told not to consider it when deciding whether Ozodi committed the crimes alleged*.

In amending the statute, the legislature certainly could not have intended to make intoxication wholly irrelevant to the defendant's state of mind. But this is precisely what the state asserted here. That is, according to the state, the jury could not even consider whether Ozodi's intoxication may have prevented him from forming criminal intent.

From a due process perspective, there does not appear to be any reason to distinguish between voluntary and involuntary intoxication. Whether the intoxication is voluntary or not has no actual bearing on whether the defendant was capable of forming the state of mind essential to the proof of the crime. Under the state's position, then, there remains the possibility that a person who is charged with committing a crime

while voluntarily intoxicated may be convicted of that crime without ever having ever *actually* formed the essential state of mind. In other words, the defendant's level of intoxication prevented him from ever forming the requisite state of mind; but, because he voluntarily became intoxicated, he can be convicted anyway. Quite literally, this means there is a lesser burden of proof when prosecuting persons who were voluntarily intoxicated at the time of the commission of the alleged offense.

There is no shortage of crimes committed by drunks in this state. Consequently, this is an issue that is likely to recur in many criminal cases throughout the state. Further, it is a substantial issue of state and federal constitutional law. If the state's interpretation is adopted, voluntarily intoxicated persons are afforded less due process than other criminal defendants. Finally, as everyone seems to agree, the issue is not well settled under the law.

Conclusion

For these reasons, it is respectfully requested that the supreme court review this matter.

Dated at Milwaukee, Wisconsin, this _____ day of January, 2021.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2974 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

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

Dated this _____ day of January, 2021:

_____

Jeffrey W. Jensen

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Petitioner's Appendix

A. Excerpt of transcript concerning the court's ruling on the proposed instruction
B. Excerpt of the transcript concerning the instruction given to the jury
C. Opinion of the Wisconsin Court of Appeals

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit

court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 names 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.

Dated this ____ day of January, 2021.

_____

Jeffrey W. Jensen