The Supreme Court of Wisconsin

21-AP-1062-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Ryan L. Bessert
Defendant-Appellant-Petitioner

Appeal from The Circuit Court of Langlade
The Honorable John B. Rhode, presiding

Petition for Review

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Statement of Issues

This case presents three issues for review. The first asks this Court to review the interpretation of the Confrontation Clause contained in the Sixth Amendment of the United States Constitution and Article I Section 7 of our State Constitution. The second asks this court to ascertain the remedy for when the right to a public trial is violated. The third requests this Court reconsider its interpretation of how our appellate system operates with regard to judicial review.

First: Both our State and Federal Constitution codify the ancient right of confronting one's accuser. Relying on *Ohio v. Roberts*, the Supreme Court of the United States held a procedure eliminating face to face confrontation was permissible as long as it was necessary and reliable. The Court subsequently overturned *Ohio v. Roberts* in *Crawford v. Washington.* After *Crawford*, does testimony taken via closed circuit television violate the Confrontation Clause?

Second: The right to a public trial is a basic tenant of our judicial system and amongst the most effectual safeguards of justice. The pronouncement of the verdict is the focal point of the proceeding. When Mr. Bessert's verdict was announced, the courthouse was closed to the public. Was announcing the verdict in a later open proceeding sufficient to remedy this violation of this constitutional safeguard?

Third: The very essence of judicial duty is to determine the operation of conflicting laws and strike down laws which violate the Constitution. Once the Wisconsin Court of Appeals decides the interaction of two laws, it is precluded from ever revisiting its interpretation. Does this preclusion violate the basic tenets of judicial review established in *Marbury v. Madison*?

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Reasons to Accept Review

This is a difficult case. Its resolution should not leave anyone comfortable. It is a case which pits our basic human instinct to protect our children and punish those who would hurt them against our duty and oaths to uphold the rule of law. As this case currently stands, vengeance and punishment have won; two of our bedrock Constitutional protections have been suborned by base human desires. It is this Court's sworn duty to uphold our Constitution and the rule of law, even at the cost this case requires.

Much of the Sixth Amendment to the Untied State's Constitution was written in repudiation of the abuses of the English Star Chamber. *Crawford v. Washington*, 541 U.S. 36, 46, 124 S.Ct. 1354, (2004). At the time of the ratification of the Sixth Amendment, there were three established exceptions to the face-to-face confrontation required by the constitution: (1) a dying declaration; (2) when the defendant engages in some course of conduct designed to prevent a witness from testifying; and (3) a prior examination if the witness were demonstrably unavailable and the defendant had the opportunity to cross-examine the witnesser the time of the examination. *Crawford* at 45.

Like many other states, our legislature has created a fourth exception; when a child witness would suffer serious emotional distress from in person testimony, a court may authorize the testimony to be taken via closed circuit audiovisual equipment from another room. Wis. Stat. §971.11(2m). While this is an admirable desire, it conflicts with both the Wisconsin and Federal Constitution. See, *District of Columbia v. Heller*, 554 U.S. 570, 634, 128 S.Ct. 2783 (2008)(Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.). When both a law and the Constitution apply in a

case, and the laws conflict, the law must be disregarded in favor of the Constitution; this is the essence of judicial duty, a duty this Court has sworn to carry out. *Marbury v. Madison*, 5 U.S. 137, 177-78, 2 L.Ed.60 (1803). Constitutional protections have costs. *Coy v. Iowa*, 487 U.S. 1012, 1020, 108 S.Ct. 2789 (1988).

The right to a public trial is a basic tenant of our judicial system and amongst the most effectual safeguards of justice. Closed proceedings must be rare, and only for cause which is shown to outweigh the value of openness. *Press-Enterprise Co. Superior Court of California*, 464 U.S. 501, 509, 104 S. Ct. 819 (1984). Like the right to confront witnesses, the American distrust of closed proceedings stems from egregious abuses of power our founder witnessed. The *verdict* in this case was issued while the courthouse was closed, and the doors were locked. Secret trials were held by the Spanish Inquisition, the Court of Star Chamber, and through the French monarchy's abuse of the *letter de cachet*. *In re Oliver*, 333 U.S. 257, 268-69, 68 S. Ct. 499, 92 L.Ed. 682 (1948). Without publicity, all other checks are insufficient, closed proceedings chip away at the integrity of the American system of criminal justice. *Id*. This Court is called upon uphold this constitution safeguard. Doing so upholds the promise our court system will never become the menace to liberty which courts in a despotic regime can become.

The cost of these Constitutional protections were too much for the Court of Appeals to bear. The Court hid behind the auspices of *Cook v. Cook*, refusing to accept its inherent judicial authority to inspect the Constitution, based on the faulty notion precedent and *stare decisis* may preclude the court from overturning a clearly erroneous opinion. It is time to review *Cook;* a court which cannot overturn its prior decisions when the

supreme law of the land demands it do so is not a court which provides meaningful judicial review.

The cost of these Constitutional protections are high, but each member of this Court has sworn to uphold the Constitution. A failure to grant review will risk eroding bedrock principles of our court system. This Court must grant review to reaffirm that the rule of law cannot be subjugated to our base human desires.

Statement of the Case

The crimes Mr. Bessert is accused of, and was found guilty of committing, are amongst the most severe, reprehensible, and heinous crimes possible to commit. Mr. Bessert has maintained his innocence since police first spoke with him. (R.1:6). After a court trial, Mr. Bessert was found guilty of two counts of each: First Degree Child Sexual Assault- Intercourse with Person under Twelve; and Incest with Child. (R.111:1).

Prior to trial, the State sought permission to have the child witness, G.B., testify from an alternate location using closed circuit audio visual equipment. (R.48:1). This issue was addressed at length in a pretrial hearing. (R.124:18-69; App. 3). Counsel for Mr. Bessert objected to this procedure on the grounds the State had not met its burden to demonstrate G.B. would not be able to reasonably communicate, or that she would suffer serious emotion distress, and that Mr. Bessert has a constitutional right to confront the witnesses who testify agains him in court. (R:.124, 50-51; 46-47). Despite the circuit court noting it had not heard any specific statement about G.B. being afraid of seeing her father, the circuit court found:

> I am going to find that forcing [G.B] to testify in the presence of her father…will result in suffering serious emotional distress such that I am concerned she could not reasonably communicate effectively in this courtroom during the trial, and that video testimony…is necessary to provide a setting that is more amenable to securing [G.B]'s uninhibited and truthful testimony. (R.124:68-69).

At trial, A.H. testified she watched Mr. Bessert change G.B.'s diaper and play with her vagina while doing so. A.H testified that after doing so, Mr. Bessert would want to "finger" her. (R.128:34:37). She also testified Mr. Bessert put his finger

inside of G.B.'s vagina while bathing with her. (R.128:39). A.H. freely admitted to using methamphetamine around the time she claims to have observed these events. (R.128:49).

G.B. testified via closed circuit television from an alternate, out of court, location. (R.128:104). Understandably, G.B. was quite nervous, and could not remember what she ate for lunch. (R.128:109). G.B. told the court when she woke up that morning, Mr. Bessert was under her blankets, "doing the bad stuff". In fact, Mr. Bessert was in the custody of law enforcement the morning of trial. G.B. told the court Mr. Bessert used his private to touch her private two times. (R.128:115-116).

Mr. Bessert testified in his own defense. He stated it would have been impossible to take a bath at the time A.H. alleged he did, as his leg had just been amputated and he had 63 staples in his leg. (R.128:168). When asked if he had ever molested his daughter, or touched his genitalia to hers, Mr. Bessert denied these allegations. (R.128:176-177).

After closing arguments, the court adjourned to deliberate at approximately 4:30. (R. 129:3). The trial resumed at 4:56, the verdict was announced, and the trial was adjourned in finality at 5:00. (R.129:3). At 4:30, the courthouse doors locked, preventing any additional members of the public from entering the courtroom and observing the most critical stage of the trial: the verdict. The circuit court took judicial notice of these facts, and no party contested them. (R.129:3-4).

The issue of the courthouse closing was brought to the circuit court's attention in a motion for a new trial. (R.98). Rather than grant a new trial, the circuit court elected to announce the verdict again in a now open court. (R.129:5)(App. 4). Shortly thereafter, Mr. Bessert was sentenced to twenty-six years of incarceration and ten years of extended supervision on counts one

and three, and fifteen years of incarceration and ten years of supervision on counts two and four. These counts run concurrently. (R. 129:55).

A notice of intent to pursue post-conviction relief was filed on September 14, 2020. (R. 115). A notice of appeal was filed on June 18, 2021. (R. 131). The Court of Appeals issued an unpublished, but authored decision on May 3, 2022.

Argument

I. This case presents two questions of Constitutional law which this Court has not addressed.

A. Does testimony taken via closed circuit television violate the Confrontation Clause's requirement of in-person confrontation?

Technological advances have turned what was once just science fiction into everyday life. Video conferencing is a significant part of our new normal. Over the past several years, courts have embraced this technology; it allowed courts to continue to maintain some operations during a global pandemic. Video conferencing is undoubtably a useful tool which should remain in the judicial toolbox.

The Wisconsin legislature, in its desire to protect our children, has seen fit to allow child witness to have their testimony taken from a room other than the court room via closed circuit audiovisual equipment. Wis. Stat. §972.11(2m). While this is an unquestionably noble purpose, this statute conflicts with both the State and Federal Constitutions.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…" This right applies to state prosecutions by incorporation through the Fourteenth Amendment. U.S. Const. amend 6; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965). To paraphrase Justice Harlan, as a simple matter of English, the confrontation clause confers at the very least the right to meet face-to-face all those who appear and give evidence at trial. *California v. Green*, 399 U.S. 149, 175 (1970). The Wisconsin Constitution is more explicit, providing "[I]n all criminal prosecutions the accused shall enjoy the right…

to meet the witnesses face to face. Wis. Const. Art. 1 §7. Despite the explicit wording of our State Constitution, the Wisconsin Supreme Court has held the state and federal right to confrontation are coextensive. *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (Wis. 1983).

Maryland v. Craig seemingly decided this constitutional conflict in a definitive manner, stating the Court would "not second-guess the considered judgement of the Maryland legislature …in protecting child abuse victims from the emotional trauma of testifying". *Maryland v. Craig*, 497 U.S. 836, 855, 110 S.Ct. 3157 (1990). However, *Craig* relied heavily on *Ohio v. Roberts*, which had erroneously held the focus of the confrontation clause was reliability, and as long as there were sufficient indicia of reliability the Confrontation Clause was satisfied. *Ohio v. Roberts*, 448 U.S. 56, 69, 100 S.Ct. 2531 (1980). The Court subsequently rejected *Roberts*, holding:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it's a procedural rather than a substantive guarantee.

Crawford v. Washington, 541 U.S. 36, 46, 124 S.Ct. 1354, (2004).

This Court has yet to determine the interaction of the Wisconsin Statute permitting a child witness's close circuit testimony and the Confrontation Clause of both the Wisconsin and Federal constitutions. In 2006, the Wisconsin Court of Appeals was asked to determine the interaction of these two seemingly conflicting laws. *State v. Vogelsberg*, 2006 WI App 228, 297 Wis. 2d 519, 724 N.W.2d 649 (WI App 2006). *Vogelsberg* upheld *Craig*, reasoning the Supreme Court would have explicitly stated it was overturning *Craig* in *Crawford* if the Court had intended to overturn it; *Crawford* and *Craig* asked different

questions, and *Crawford* addresses the question of when confrontation is required while *Craig* addresses what procedure is required. The *Vogelsburg* Court's reasoning is entirely unsupported by the plain text of the two decisions.

This Court is the primary law declaring court of the State, and the final arbiter of our Constitution. If our Constitution does not mean what it explicitly states, that an accused has the right to meet the witnesses face to face, this Court should be the court to make this bold claim.

B. Does announcing a verdict in a later open proceeding sufficiently remedy an inadvertent courthouse closure during the original announcement?

Both the Wisconsin and Federal Constitutions protect the right to a public trial. U.S. Const. amend 6; Wis. Const. Art. 1 §7. Like most of our Constitutional rights, this right is not absolute. When a judge chooses to close the courtroom, the judge must make specific findings as to the reason, and narrowly tailor the closure. *Waller v. Georgia*, 467 U.S. 39, 45, 48, 104 S. Ct. 2210, 81 L.Ed 31 (1984); *State v. Pinno*, 2014 Wis. 74 ¶6 356 Wis. 2d 106, 850 N.W.2d 207 (Wis. 2014); see also *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612 (Wis. 2009).

Neither this Court or the Supreme Court of the United States have dealt with the question of inadvertent closure.

This case marks the second time the Wisconsin Court of Appeals has opined on inadvertent closure. The first came in *State v.Vanness*, where the courthouse was closed for the defense case, and the State's rebuttal. *State v.Vanness*, 2007 WI App 195, 304 Wis. 2d 692, 738 N.W.2d 154 (WI App 2007). Recognizing the requirement of the public trial is for the benefit of the accused, the *Vanness* court remanded the case for a new trial

Here, the courthouse was closed for the pronouncement of the verdict. The verdict is the focal point of the entire proceeding. *United States v. Canady*, 126 F.3d 352, 364 (3rd Cir. 1997). Excluding the public affects the integrity and legitimacy of the entire judicial process. *Id.* Despite this, the court of appeals held simply repeating the verdict in a later, open proceeding was sufficient remedy.

Courts should not dispense with one of the most essential protections our founders enshrined in our constitution so causally. If such a limited and perfunctory remedy is sufficient to remedy the violation of one of our most important Constitutional protections, it should be this Court making that determination, not a lower court overly concerned with a defendant's potential windfall.

II. The Constitutional questions presented by this case are legal questions within fact patterns which are likely to reoccur.

A. Does testimony taken via closed circuit television violate the Confrontation Clause's requirement of in-person confrontation?

As noted prior, video conferencing is an incredibly useful technology, and its use in many judicial proceedings should be encouraged. As prosecutors have been forced to become more adapt at using video conferencing technology, it is a logical conclusion more prosecutors will seek to invoke the procedures outlined in Wis. Stat. §972.11(2m) to protect the child witnesses.

The first constitutional question in this case, the interaction of the confrontation clause and the legislatures desire to protect child witnesses, is a question which will likely arise with an increased frequency. This Court should take the opportunity to address this pressing issue. If this Court were to wait and let the issue percolate through the lower courts, it risks a surge in cases using this procedure which should later be held to be constitutionally invalid. The risk of putting a larger amount of children through a second trial should not be a risk this court is willing to take.

B. Does announcing a verdict in a later open proceeding sufficiently remedy an inadvertent courthouse closure during the original announcement?

The second constitutional question posed by this case is has previously occurred , even if it does not occur at a high frequency. Courthouses are not open every hour of the day. The judiciary simply has limited human resources. Jury deliberations, or in this case, the deliberation by a judge, are moments of intense and critical decision making. Appropriately, these decisions often

take significant amounts of time. Frequently, jurors elect to deliberate longer in the day rather than returning for another days service.

Inadvertent closure will certainly happen again. Fifteen years ago, the Court of Appeals dealt with a similar inadvertent closure, where the courthouse was locked at 4:30 p.m. *State v.Vanness*, 2007 WI App 195, 304 Wis. 2d 692, 738 N.W.2d 154 (WI App 2007). Recognizing the requirement of the public trial is for the benefit of the accused, the *Vanness* court remanded the case for a new trial when the jury heard 71 minutes of testimony, consisting of the defense case and rebuttal.

The State did not pursue review of *Vanness*. Here, this Court has the opportunity to opine on this repeated occurrence. While this Court has reviewed intentional court closures, it has not opined on incidental closures. There is limited applicable caselaw throughout the country. This Court should grant review to guide courts within the State and throughout the country.

III. This case questions the role and function of the Court of Appeals. This is a legal question best addressed by this Court.

At the dawn of our republic, Justice John Marshall asked why a judge would swear to discharge their duties agreeably to the Constitution the judge could not inspect and interpret the Constitution. *Marbury v. Madison*, 5 U.S. 137, 180, 2 L.Ed.60 (1803). After all, it is the very essence of judicial duty determine the interaction of conflicting laws, and when a law is in opposition to the Constitution, to disregard the nonconforming law. *Marbury*, at 178. Justice Marshall reasoned if a judge could no longer inspect and interpret the Constitution, the judicial oath becomes not just a mockery, but a crime in and of itself. *Id.* at 180.

Twenty-five years ago, this Court stripped the Court of Appeals of its authority to overturn its published cases, preventing the court from inspecting and interpreting the Constitution once a prior decision had done so. This was based primarily on the principle of *stare decisis*. But *stare decisis* is not an inexorable command and is at its weakest when interpreting the Constitution. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405, 206 L.Ed. 2d 583 (2020). When considering whether to revisit a prior decision, courts should consider a number of factors: the quality of the reasoning; consistency with related decisions; and whether the decision is unworkable. *Id*; *Seminole Tribe v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 134 L.Ed. 2d 252 (1996). Each of these factors points to the same conclusion, *Cook v. Cook* should be revisited and overturned.

The first factor this Court should consider is the quality of the decision. This is the factor which this Court should weigh the greatest. If a prior decision was properly decided, there is no

reason to revisit it; likewise when a prior decision is egregiously wrong, each other factor is of limited importance as there is often "practically impossible to correct through other means". *Ramos*, at 1405.

The decision in *Cook v. Cook* was wrong when it was decided. The judges amongst the Court of Appeals had split as to whether they had the authority to overrule, modify or withdraw language from their erroneous past precedent. The *Cook* Court began by stating the purposes of the two courts: The Court of Appeals is primarily an error correcting court, but does act as a law defining and developing court. *Cook v. Cook*, 208 Wi.s 2d 166, 188. The Supreme Court acts as the primary developer and declarant of law. *Id.* 189. These premisses are undoubtably correct.

The Court then stated the State Constitution and the applicable statutes must be read to provide only the Supreme Court has the power to overrule the court of appeals. Yet the Court quoted no constitutional or statutory provision in making this bold declaration. This is unsurprising as there is nothing in the text which would support this radical position. If there were, the judges of the Court of Appeals would likely not have spilt in their views.

More concerning is the seminal case of *Marbury v. Madison.* Writing for an unanimous Court, Justice Marshall expounded on the principles of judicial review, appellate jurisdiction, and the supremacy of the Constitution. The Constitution is the the fundamental and paramount law of the nation. *Marbury*, at 177. It is the duty of the judiciary to say what the law is. *Id*. Case law is undoubtably law. A law repugnant to the Constitution is void. *Id*. at 180. *Cook* turns this doctrine on its head. *Stare decisis* and the judicial common law

has become the supreme law of the Court of Appeals. . The Constitution may only be looked into once by the court. Subsequent judges may not reconsider the interaction of a law and the Constitution. The Constitution is closed to them. As Justice Marshall stated: "This is too extravagant to be maintained". *Id*. at 179. An important constitutional decision with plainly inadequate rational support should not be left in place for the sole reason it once attracted two votes. *Payne v. Tennessee*, 501 U.S. 808, 834, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991)(Scalia, J., Concurring).

The second factor, consistency with related decisions, also favors reversal. *Cook* is inconsistent with normal practices of the judicial branches, and has never been cited by an out-of-state court for it principles relating to a lower court's ability to overrule its own decisions. The federal circuits maintain the ability to overturn their precedents. *See e.g.*, Joseph W. Mead, *State Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 794-800, (2012). This limitation on the court of appeal's judicial authority is an anomaly amongst the appellate courts in the country.

Cook's refusal to allow the Court of Appeals to overturn its erroneous decisions, and the allowance of persuasive, non-binding opinions appears to have stagnated the development of law in the court of appeals.[1,2] From 2002 through 2009, the Court of Appeals published 7.16% of the cases before it. Since 2010, the Court of Appeals has published an opinion in just 3.9% of the cases filed. In criminal matters this number is even lower, the Court

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[1] The Court of Appeals Annual Report is available from 2002 onward

[2] In 2009, this Court amended Wis. Stat. § (Rule) 809.23 regarding publication to allow for citation to unpublished authored decisions for persuasive value.

publishes a decision in only 2.61% of cases. In 2010, the Court of Appeals published decisions in 5.4% of its cases, the highest rate in the past 12 years, but a lower rate than any of the prior years.

In comparison, the federal circuit courts of appeals have published 17.9% of cases between 2002-2009, and 12.8% of cases from 2010-2021. This Court accepted 8.63% of petitions for review from 2002-2009, and 7.74% of petitions from 2010-2021. While the development of the law continues in a robust pace in both this Court and the federal circuits, the Court of Appeals is increasingly unwilling to publish an opinion. This undermines the rule of law as litigants are increasingly forced to rely on persuasive opinions which may be casually discarded. Overturning *Cook* will free the court of appeals from its shackles and allow the law to develop without fear of making an eternally binding mistake.

Conclusion

For the foregoing reasons, Mr. Bessert respectfully request this Court grant review.

Dated: Wednesday, June 1, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,208 words.

Signed: Steven Roy

Signature 

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (2)

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; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.
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Signed Steven Roy
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I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19 (13). I further certify that:
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