

FILED
09-11-2024
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2023AP002362

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND
PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING
BOARD,
AND CLARENCE P. CHOU, M.D.,
Plaintiffs-Respondents,

CHRISTOPHER J. FORD, KRISTIN J. LYERLY, and JENNIFER J.
MCINTOSH,
Intervenors-Respondents,

vs.

JOEL URMANSKI, as District Attorney for Sheboygan County, WI,
Defendant-Appellant,

JOHN T. CHISHOLM, as District Attorney for Milwaukee County, WI, and
ISMAEL R. OZANNE, as District Attorney for Dane County, WI,
Defendants-Respondents.

On Appeal from the Circuit Court of Dane County
Case No. 2022CV001594
Honorable Diane Schlipper Presiding

**DEFENDANT-RESPONDENT JOHN T. CHISHOLM'S BRIEF IN
RESPONSE TO DEFENDANT-APPELLANT JOEL URMANSKI'S
OPENING BRIEF**

Samuel J. Leib (SBN: 1003889)
Aaron D. Birnbaum (SBN: 1054441)
Leib Knott Gaynor LLC
219 North Milwaukee Street
Suite 710

Milwaukee, WI 53202

(414) 276-2102

sleib@lkglaw.net

abirnbaum@lkglaw.net

Counsel for Defendant-Respondent

John T. Chisholm

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUE.....	5
STATEMENT ON ORAL ARGUMENT & PUBLICATION	5
STANDARD OF REVIEW	5
ARGUMENT	6
I. District Attorneys’ Prosecutorial Discretion Should Not Be Infringed ..	6
II. The Attorney General Has No Supervisory Authority Over District Attorneys	7
III. Current Status of Wisconsin Law is Unclear	8
CONCLUSION.....	10
CERTIFICATION AS TO FORM & LENGTH	11

TABLE OF AUTHORITIES

Cases

<i>Babbitz v. McCann</i> , 310 F. Supp. 293 (E.D. Wis. 1970)	9
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	6
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d 604 (1978) ..	7
<i>County of Kenosha v. C & S Mgmt.</i> , 223 Wis. 2d 373, 588 N.W.2d 236 (1999)..	7
<i>Emery v. State</i> , 101 Wis. 627, 78 N.W. 145 (1899)	8
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962).....	7
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	9
<i>Sears v. State</i> , 94 Wis. 2d 128, 287 N.W.2d 785 (1980).....	7
<i>State ex rel. Arthur v. Superior Court of Dane County</i> , 257 Wis. 430 (1950).....	8
<i>State ex rel. Kalal v. Circuit Court for Dane County (In re Criminal Complaint)</i> , 2004 WI 58,.....	7, 8
<i>State ex rel. Kurkierewicz v. Cannon</i> , 42 Wis. 2d 368 (1969)	6, 7
<i>State v. Black</i> , 188 Wis.2d 639, 536 N.W.2d 132 (1994)	9
<i>State v. Karpinski</i> , 92 Wis. 2d 599, 285 N.W.2d 729 (1979).....	6,7,8
<i>State v. Kenyon</i> , 85 Wis. 2d 36, 270 N.W.2d 160 (1978)	8
<i>State v. Peterson</i> , 195 Wis. 351, 218 N.W. 367 (1928)	6
<i>Thompson v. State</i> , 61 Wis. 2d 325, 212 N.W.2d 109 (1973).....	7
<i>United States v. Agurs</i> , 427 U.S. 97 (1976).....	6
<i>United States v. Armstrong</i> , 517 U.S. 456, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996).....	6
<i>United States v. Goodwin</i> , 457 U.S. 368, 73 L. Ed. 2d 74, 102 S. Ct. 2485 (1982).....	6
<i>Wayte v. United States</i> , 470 U.S. 598, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985)	6

Statutes

Wis. Stat. § 940.04.....	5,9
Wis. Stat. § 940.05(5)	9
Wis. Stat. § 165.015.....	8
Wis. Stat. § 968.02(1)	7
Wis. Stat. § 978.01(1).....	8

Other Authorities

<i>ABA Criminal Justice Standards for the Prosecution Function</i> § 3.12(a) (4th ed. 2017) (<i>ABA Criminal Justice Standards</i>)	6,7
<i>ABA Criminal Justice Standards for the Prosecution Function</i> § 3.12(b) (4th ed. 2017) (<i>ABA Criminal Justice Standards</i>)	6

STATEMENT OF THE ISSUE

Does Wis. Stat. § 940.04 prohibit a consensual medical abortion? The circuit court answered that Wis. Stat. § 940.04 does not apply to consensual medical abortions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent Chisholm believes this case is appropriate and merits oral argument. Additionally, for the reasons set for in this brief, this matter has substantial importance, meets the criteria for publication under Wis. Stat. § 809.23(1)(a) and should be published to bring clarity and direction to the citizens of Wisconsin.

STANDARD OF REVIEW

Defendant-Respondent Chisholm agrees that the proper standard for statutory interpretation is a question of law for which an appellate review would be *de novo*.

ARGUMENT

Introduction

“The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court.” *ABA Criminal Justice Standards for the Prosecution Function* § 3-1.2(a) (4th ed. 2017) (*ABA Criminal Justice Standards*). In order to effectively administer justice, District Attorney Chisholm agrees that the citizens of Wisconsin deserve a clear understanding of what fundamental rights are protected under state statutes. While Defendant Chisholm will accept and abide by any decision of this Court, the independence and discretion of Wisconsin district attorneys must also be preserved.

I. District Attorneys’ Prosecutorial Discretion Should Not Be Infringed

“The district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial.” *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378 (citing *State v. Peterson*, 195 Wis. 351, 359, 218 N.W. 367 (1928)). The district attorney's role is "quasi-judicial" in the sense that it is his or her duty to administer justice rather than simply obtain convictions. *State v. Karpinski*, 92 Wis. 2d 599, 607; *Kurkierewicz*, 42 Wis. 2d at 378. This follows the federal model where “[t]he Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation's criminal laws. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486, 134 L.Ed.2d 687, 698 (1996), citing *Wayte v. United States*, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 73 L. Ed. 2d 74, 102 S. Ct. 2485 (1982)).

A prosecutor “must always be faithful to his client’s overriding interest that ‘justice shall be done.’” See *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Moreover, the district attorney serves the public interest “by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.” See *ABA Criminal Justice Standards for the Prosecution Function* § 3.12(b) (4th ed. 2017) (*ABA Criminal Justice Standards*).

District attorneys in Wisconsin have primary responsibility and wide discretion to determine whether to commence a criminal prosecution. *State ex rel. Kalal v. Circuit Court for Dane County (In re Criminal Complaint)*, 2004 WI 58, P27, citing *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). However, a prosecutor's job is "not merely to convict," but rather to "act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances." *ABA Criminal Justice Standards* § 3.12(b).

"A prosecutor has great discretion in deciding whether to prosecute in a particular case." *County of Kenosha v. C & S Mgmt.*, 223 Wis. 2d 373, 400, 588 N.W.2d 236 (1999) (citing *Sears v. State*, 94 Wis. 2d 128, 133, 287 N.W.2d 785 (1980)). The exercise of "sound discretion and independent judgment" is critical to the performance of the prosecutorial function. See *ABA Criminal Justice Standards* at § 3.12(a). "Exercise of this discretion necessarily involves a degree of selectivity." *Sears*, 94 Wis. 2d at 134. The US Supreme Court has recognized that "'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668-69, 54 L.Ed.2d 604, 611, (1978) citing *Oyler v. Boles*, 368 U.S. 448, 456. The Wisconsin Supreme Court has recognized that "there is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him." *Kalal*, 2004 WI 58, P30, citing *Kurkierewicz*, 42 Wis. 2d at 378; see also *Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973).

II. The Attorney General Has No Supervisory Authority Over District Attorneys

While the intervening physicians have proper standing, Attorney General Kaul is not a proper party as AG Kaul has no direct supervisory power over district attorneys. Wisconsin district attorneys are locally elected and whose authority is conferred by Wis. Stat. § 968.02(1), which provides that "except as otherwise provided in this section, a

complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed." *State ex rel. Kalal v. Circuit Court for Dane County (In re Criminal Complaint)*, 2004 WI 58, P27.

The citizens of the State of Wisconsin have the right to choose their elected representatives, including district attorneys. Pursuant to Wisconsin Statutes, the citizens of each county elect their respective district attorney to serve, represent and execute the duties of the office as they see fit. Wis. Stat. § 978.01(1). In general, "the prosecuting attorney is answerable to the people of the state and not to the courts or the legislature as to the way in which he exercises power to prosecute complaints." *Kalal* at P30, *citing Karpinski*, 92 Wis. 2d at 608; *Kurkierewicz*, 42 Wis. 2d at 378; *State v. Kenyon*, 85 Wis. 2d 36, 42, 270 N.W.2d 160 (1978).

In contrast, Wisconsin Attorney General's powers are generally conferred by Wis. Stat. § 165.015. Wisconsin Statutes allow for the Attorney General to give opinions to officers, including district attorneys, when requested, but nothing in Wis. Stat. §165 confers any supervisory authority of the Attorney General over local district attorneys. "The law has been long established that the attorney-general may aid a district attorney in the prosecution of a criminal case when requested by the governor." *State ex rel. Arthur v. Superior Court of Dane County*, 257 Wis. 430, 433, *citing Emery v. State*, 101 Wis. 627, 78 N.W. 145 (1899). However, there is no provision in Wisconsin Statutes that confers the supervisory authority of the Attorney General's office over the duly elected local district attorneys.

III. Current Status of Wisconsin Law is Unclear

Defendant-Appellant Urmanski's brief tends to prove the problematic point as to the unclear status of Wisconsin law pertaining to the rights of pregnant women and the chilling effect on Wisconsin healthcare providers who seek to provide them care. In his opening brief and despite his assertion to the contrary, Urmanski has made clear his opinion on what the law on abortion should be. (Urmanski Brief at 14) Urmanski believes that consensual abortion should be regulated as a matter of public policy, as

reflected in his belief that “Wisconsin law prohibits performing abortions (including consensual abortions) from conception until birth (subject to Section 940.05(5))”. *Id.* Most important to Defendant-Respondent John Chisholm is that district attorneys throughout Wisconsin have clear and unambiguous law(s) that inform them in ways that they can appropriately exercise the discretion which is inherent in their official duties. The reproductive rights of pregnant women and the duties and obligations of healthcare providers who care for the women of Wisconsin pertaining to termination of pregnancy is currently not clear and is ambiguous. Accordingly, the appropriate exercise of prosecutorial discretion in the face of the current Wisconsin laws is unclear. Equally important is the concern that citizens of Wisconsin are confronted with a lack of clarity in Wisconsin law as to what their rights and duties are in the face of the reversal of *Roe v. Wade*, 410 U.S. 113 (1973).

The trial court concluded that Wis. Stat. § 940.04 is not an abortion statute and that there is no prohibition in Wisconsin law to consensual abortions. Although cited in Defendant-Appellant’s Opening Brief, *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970) does not undermine Judge Schlipper’s ruling which is reasonably grounded and supported by the court in *State v. Black*, 188 Wis.2d 639, 536 N.W.2d 132 (1994). The opposite appears to be DA Urmanski’s “opinion on what the law currently is...” (Urmanski Brief at 14). Both Judge Schlipper and Defendant-Appellant Urmanski cannot be right, and Urmanski’s opinion thus proves the point; Judge Schlipper’s ruling is the law unless it is determined by this Court that another opinion is “right”.

There are many district attorneys in Wisconsin who believe that clarity does not exist regarding a woman’s reproductive rights specific to termination of a pregnancy. DA Chisholm is one of those district attorneys and believes the law needs to be settled by this Court in a fashion which is just and will allow consistent enforcement that aligns with Wisconsin values and principles.

CONCLUSION

For the foregoing reasons, Defendant-Respondent Chisholm requests that the Court provide clarification on the statutes affecting reproductive rights while preserving the prosecutorial discretion inherent in the powers of Wisconsin's district attorneys.

Dated this 11th day of September 2024.

LEIB KNOTT GAYNOR LLC

Attorneys for Defendant-Respondent
John T. Chisholm

Electronically signed by Samuel J. Leib

Samuel J. Leib (SBN: 1003889)

Aaron D. Birnbaum (SBN: 1054441)

P.O. Address

219 North Milwaukee Street

Suite 710

Milwaukee, WI 53202

P: 414-276-2102

F: 414-276-2140

E: sleib@lkglaw.net

abirnbaum@lkglaw.net

FORM AND LENGTH CERTIFICATE

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. It is in proportional serif font. The length of this brief is 10 pages and 2,142 words.

Dated this 11th day of September 2024.

LEIB KNOTT GAYNOR LLC

Attorneys for Defendant-Respondent
John T. Chisholm

Electronically signed by Samuel J. Leib
Samuel J. Leib (SBN: 1003889)
Aaron D. Birnbaum (SBN: 1054441)

P.O. Address

219 North Milwaukee Street
Suite 710
Milwaukee, WI 53202
P: 414-276-2102
F: 414-276-2140
E: sleib@lkglaw.net
abirnbaum@lkglaw.net