

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 04-1005-CR~~15~~

STATE OF WISCONSIN,

Plaintiff-Respondent,

GWENDOLYN McGEE,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM THE NONFINAL
ORDER ENTERED IN MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE DANIEL L.
KONKOL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-
APPELLANT

AMELIA L. BIZZARO
Attorney at Law

Bizzaro Law Office
P.O. Box 511673
Milwaukee, Wisconsin 53203
Telephone (414) 793-5736

Attorney for Defendant-Appellant

TABLE OF CONTENTS

ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
ARGUMENT	6
I. THE TRIAL COURT ERRED IN RULING THAT A CONVICTION IS A PREREQUISITE TO A HEARING UNDER SEC. 118.15(5)(B)(2).....	6
A. Standard of Review.....	6
B. The Trial Court Misinterpreted the Statute in Making its Ruling Because a Conviction Under Section 118.15(1) is not Required to Trigger Section 118.15(5)(b)(2).....	7
C. The Language of the Statute Requires a Pre-Trial Evidentiary Hearing Rather than a Post-Trial Hearing	10
D. The Legislature Intended Cases to be Dismissed Pretrial Rather than Post-Trial, Post-Conviction.....	12
CONCLUSION	15
APPENDIX	100

CASES CITED

<i>Brant v. LIRC</i> , 160 Wis. 2d 353, 466 N.W.2d 673 (Ct. App. 1991)	7
<i>Schaetz v. Town of Scott</i> , 222 Wis. 2d 90, 585 N.W.2d 889 (Ct. App. 1998)	7
<i>State v. Clark</i> , 162 Wis. 2d 406, 469 N.W.2d 871 (Ct. App. 1991)	10
<i>State v. Dane County</i> , 214 Wis. 2d 605, 571 N.W.2d 385 (1997)	7
<i>State v. Davis</i> , 2001 WI App 63, 242 Wis. 2d 344, 626 N.W.2d 5 (Ct. App. 2001)	10
<i>State v. Kittilstad</i> , 224 Wis. 2d 204, 585 N.W. 2d 925 (Ct. App. 1998)	7
<i>State v. Michels</i> , 141 Wis. 2d 81, 414 N.W.2d 311 (Ct. App. 1987)	6
<i>State v. Whitrock</i> , 119 Wis. 2d 664, 350 N.W.2d 647 (1984)	7, 8

CONSTITUTION PROVISIONS AND STATUTES

<u>Wisconsin Statutes</u> 1899-1906 Wis. Stats. Supp. § 439a.....	12
1959 Wis. Stat. § 40.77.....	12

1959 Wis. Stat. § 40.77(1).....	13, 14
1959 Wis. Stat. § 40.77(3).....	13
1967 Wis. Stat. § 118.15.....	14
1967 Wis. Stat. § 118.15(1).....	14
1967 Wis. Stat. § 118.15(5).....	14
1987 Wis. Stat. § 118.15(5)(b)	15
1997 Wis. Stat. § 118.15(5)(b)	15
Wis. Stat. § 49.26(1)(h)	5, 8
Wis. Stat. § 118.15.....	9
Wis. Stat. § 118.15(1).....	4, 8, 12
Wis. Stat. § 118.15(1)(5)	1, 2
Wis. Stat. § 118.15(5).....	11
Wis. Stat. § 118.15(5)(a)	2, passim
Wis. Stat. § 118.15(5)(a)(1).....	8
Wis. Stat. § 118.15(5)(a)(1)(a)	4
Wis. Stat. § 118.15(5)(b)	2, 5, 6, 8
Wis. Stat. § 118.15(5)(b)(1)	8
Wis. Stat. § 118.15(5)(b)(2)	1, passim
Wis. Stat. § 118.16(5).....	2, 4
Wis. Stat. § 118.16(5m).....	5
Wis. Stat. § (Rule) 809.50(3).....	4
Wis. Stat. § 948.45.....	4, 8

OTHER AUTHORITIES

1967 Wis. Laws c. 92, page 304, Prefatory Note 13
1967 Wis. Laws c. 92, page 305, Prefatory Note 14
1987 Wis. Laws. Act 285 §§ 21-22 15
1997 Wis. Laws. Act 239 §§ 10-15 15
1999 Black’s Law Dictionary 7th ed. 9

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STATE OF WISCONSIN,

Plaintiff-Respondent,

GWENDOLYN McGEE,

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ON NOTICE OF APPEAL FROM THE NONFINAL
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ISSUE PRESENTED

Did the court err in ruling that sec.
118.15(5)(b)(2), Stat., calls for a post-trial post-
conviction evidentiary hearing, rather than a pre-trial

evidentiary hearing as the plain language of the statute indicates?

The trial court ruled that a conviction under sec. 118.15(5)(a), Stat., was a prerequisite to triggering sec. 118.15(5)(b), Stat.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant, Gwendolyn McGee, requests both oral argument and publication. This is an issue of first impression in Wisconsin that will affect at least 80 cases in Milwaukee County alone.

STATEMENT OF THE CASE

A complaint was filed December 5, 2002 charging Ms. McGee with one count of failure to cause child to attend school, contrary to secs. 118.15(1)(5) and 118.16(5), Stats., (the Compulsory School Attendance law) (2; App 101-103). The matter was eventually set for jury trial before the Honorable Judge John McCormick (6). However, on the day of trial, February 11, 2004, the case was administratively transferred to the Honorable Judge Daniel L. Konkol, pursuant to Milwaukee County

Chief Judge Direct 03-17 and scheduled for Status of March 4, 2004 (8). On that day, Ms. McGee filed a motion requesting a pre-trial evidentiary hearing pursuant to sec. 118.15(5)(b)(2), Stat., and requested a day to be heard on her motion (9). The trial court declined to schedule the matter for a hearing, and instead ruled immediately on the motion, denying it as premature (20).

Ms. McGee filed a Motion to Reconsider on March 18, 2004 (11). Her motion was denied March 19, 2004 (12). A written order denying Ms. McGee's request for a hearing under sec. 118.15(5)(b)(2), Stat., was entered into the record on March 26, 2004 (13). On April 2, 2004, Ms. McGee filed a Motion to Stay Proceedings and her motion was granted after a hearing held April 5, 2004 (14) (15).

On April 9, 2004, Ms. McGee filed a Petition and Memoranda for Leave to Appeal a Nonfinal Order of the Circuit Court and a Motion for a Three-Judge Panel. The State did not oppose Ms. McGee's petition. Ms. McGee's motion for a three-judge panel was granted in

an order dated April 27, 2004 (27). On the same day, this court entered an order granting Ms. McGee's petition, having the effect of the filing of a notice of appeal (27). *See also* Wis. Stat. § (Rule) 809.50(3) .

STATEMENT OF FACTS

The complaint alleges that Ms. McGee's son, who was a student enrolled at Westside Academy II, missed 94 of 168 school days, of which 83.5 were unexcused absences during the 2001-2002 school year (2; App. 101-103). As a result, Ms. McGee was charged with a violation of sec. 118.15(1), Stat. , which requires "any person having under control a child who is between the ages of 6 and 18 years [to] cause the child to attend school regularly[.]" Wis. Stat. § 118.15(1). First time violators face a maximum \$500 fine or 30 days imprisonment or both. Wis. Stat. § 118.15(5)(a)(1)(a).

Ms. McGee's motion for a pre-trial hearing was based on sec. 118.15(5)(b)(2), Stat. , which reads:

(a). 1. Except as provided under par. (b) or if a person has been found guilty of a misdemeanor under s. 948.45, whoever violates this section may be penalized as follows, if evidence has been provided by the school attendance officer that the activities under s. 118.16(5) have been completed

or were not required to be completed as provided in s. 118.16(5m) :

- a. For the first offense, by a fine of not more than \$500 or imprisonment for not more than 30 days or both
- b. For a 2nd or subsequent offense, by a fine of not more than \$1,000 or imprisonment for not more than 90 days or both.

* * * *

(b) 1. Paragraph (a) does not apply to a person who has under his or her control a child who has been sanctioned under s. 49.26(1)(h).

2. In a prosecution under par. (a), if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed and the child shall be referred to the court assigned to exercise jurisdiction under ch. 48.

Rather than giving Ms. McGee a date to be heard on her motion, the trial court found that the motion was premature and denied it the day it was filed (20:2). In so doing, the court said:

“The section that you cite refers to someone who’s been found guilty of a misdemeanor under section (5)(a) , so paragraph (b) doesn’t apply unless there’s already been the conviction under (5)(a) , so if the defendant is convicted, then the Court can look at the next step and see if there’s – if the defendant is unable to comply because of the disobedience of the child. Then the Court can dismiss the action and refer the matter to the juvenile court...so I think there has to [be] a conviction first before the Court can get to that point, so the request for the motion hearing is denied at this time as premature.”

(20:2)

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT A CONVICTION IS A PREREQUISITE TO A HEARING UNDER SEC. 118.15(5)(b)(2)

The trial court erred in concluding that sec. 118.15(5)(b)(2), Stat., applies only after a defendant has been convicted. The court's ruling incorrectly linked sub. (5)(a) with sub. (5)(b) , erroneously finding that sub. (5)(b) applied only after a conviction under (5)(a) . Not only does this ruling present significant procedural problems, but it belies the language of the statute and the intent of the legislature. The legislature's provision for a dismissal and referral to children's court provided in sub. (5)(b) indicates that a pre-trial evidentiary hearing is necessary.

A. Standard of Review

Statutory construction is a question of law that this court reviews *de novo*. *State v. Michels*, 141 Wis. 2d 81, 87, 414 N.W.2d 311 (Ct. App. 1987). The primary source of interpretation is that language of the statute itself. *State v. Whittrock*, 119 Wis. 2d 664, 350 N.W.2d

647 (1984). If the statute's plain language is clear and unambiguous on its face, it is the court's duty to give that language its ordinary and accepted meaning. *State v. Kittilstad*, 224 Wis. 2d 204, 585 N.W. 2d 925 (Ct. App. 1998).

In examining a statute, the Court "give[s] effect to every word of a statute, if possible, so that no portion of the statute is rendered superfluous." *State v. Dane County*, 214 Wis. 2d 605, 619, 571 N.W.2d 385, 390 (1997). Additionally, the statutory provisions are not construed in isolation, but must be read in conjunction with related sections. *Schaetz v. Town of Scott*, 222 Wis. 2d 90, 96, 585 N.W.2d 889 (Ct. App. 1998). "[T]he entire section of a statute and related sections are to be considered in its construction...we do not read statutes out of context." *Id. quoting Brant v. LIRC*, 160 Wis. 2d 353, 362, 466 N.W.2d 673, 676 (Ct. App. 1991).

B. The Trial Court Misinterpreted the Statute in Making its Ruling Because a Conviction Under Section 118.15(1) is not Required to Trigger Section 118.15(5)(b)(2).

When interpreting statutes, the court must first look to the plain language of the statute. *Whitrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647 (1984).

Sub. (5)(a) is an explanation of the possible penalties that can be imposed upon a person convicted of failure to cause a child to attend school. It is applicable to every defendant charged under the Compulsory School Attendance law with two exceptions. First, the penalties do not apply to a person who “has been found guilty of a misdemeanor under s. 948.45[.]”¹ Wis. Stat. § 118.15(5)(a)(1). In other words, the penalties for violating the Compulsory School Attendance law do not apply to someone convicted of Contributing to Truancy. Second, the penalties do not apply to a person “who has under his or her control a child who has been sanctioned under s. 49.26(1)(h)[.]” Wis. Stat. § 118.15(5)(b)(1).

Sub. (5)(b) applies only to defendants charged under sec. 118.15(1), Stat. , where disobedience of the

¹ Section 948.45 is entitled Contributing to Truancy and provides that “any person 17 years of age or older who, by any act or omission, knowingly encourages or contributes to the truancy, as defined under s. 118.16(1)(c), of a person 17 years of age or under is guilty of a Class C misdemeanor.”

child is at issue. In those cases, the defendant must prove that the child's disobedience interfered with his or her ability to comply with the statute. Wis. Stat. § 118.15(5)(b)(2). If the defendant meets this burden, the case "shall be dismissed and the child shall be referred to the court assigned to exercise jurisdiction under ch. 48."

Id.

Here, the court found that sec. 118.15(5)(b)(2), Stat., applied only after a conviction under sec. 118.15(5)(a) , Stat. However, nothing in sec. 118.15, Stat., requires a conviction of a misdemeanor prior to the defendant bringing a motion for a hearing under sec. 118.15(5)(b)(2), Stat. The language is clear: "In a prosecution under paragraph (a), if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed..." Wis. Stat. § 118.15(5)(b)(2). The word "dismissed" is defined as "[t]ermination of an action or claim without further hearing, esp. before the trial of the issues involved." 1999 Black's Law Dictionary 7th ed.

C. The Language of the Statute Requires a Pre-Trial Evidentiary Hearing Rather than a Post-Trial Hearing

The trial court has the power to dismiss a case where there is statutory authority to do so. *State v. Clark*, 162 Wis. 2d 406, 410, 469 N.W.2d 871 (Ct. App. 1991), *State v. Davis*, 2001 WI App 63, 242 Wis. 2d 344, 626 N.W.2d 5 (Ct. App. 2001). Section 118.15(5)(b)(2), Stat., grants the trial court with authority to dismiss an action upon proof by the defendant that the child's disobedience prevented her from complying with the law.

Ms. McGee must be offered a pre-trial opportunity to prove the child's disobedience pursuant to sec. 118.15(5)(b)(2), Stat. To do otherwise creates an intolerable burden on the court system and is inherently impractical.

The trial court's interpretation in this case would require a defendant, once convicted, to move to suspend entry of the verdict and request an evidentiary hearing. The defendant, then, using the same witnesses, presenting the same testimony, using a lower burden of proof, will

have to convince the trial court that the disobedience of the child did indeed interfere with her ability to comply with the law.

Under the trial court's interpretation, if the defendant is successful, the court would have to vacate the jury's verdict and order the case dismissed. However, if the defendant is unsuccessful, the jury's verdict of guilty would be accepted and a judgment of conviction would be entered into the record. According to the trial court's ruling in this case, if the jury acquitted the defendant of the charge, then sec. 118.15(5)(b)(2), Stat., is inapplicable.

This post-trial procedure is counterintuitive and imposes a substantial burden on the court system. This is an expensive and time-consuming process, which is unnecessary under sec. 118.15, Stat., which allows for resolution of the case in a pre-trial evidentiary hearing. Holding the hearing at the pre-trial stage, rather than post-trial, conserves judicial resources and immediately

provides the defendant and child with resources necessary to resolve the underlying issues cause the child's truancy.

D. The Legislature Intended Cases to be Dismissed Pretrial Rather than Post-Trial, Post-Conviction

The Compulsory School Attendance law was enacted in 1889, and has since undergone several changes. As early as 1901, the Compulsory School Attendance law (then called Compulsory Education) contained language that allowed a defendant to use evidence of the child's disobedience as a defense for not complying with the law. 1899-1906 Wis. Stats. Supp. § 439a. A look at the history of the Compulsory School Attendance law reveals that the legislature always meant for the language regarding the effect of the disobedience of the child to apply to defendants charged with a violation of sec. 118.15(1), Stat., and that a conviction was not a necessary prerequisite.

The old Compulsory School Attendance law, found in Section 40.77, was divided into three main parts. The final subpart, entitled "Penalty," laid out the minimum and maximum penalties and also included the

following sentence: "In a prosecution under this section, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, it shall be a good defense and such child shall be proceeded against as delinquent in the manner and in the courts specified in ch. 48." 1959 Wis. Stat. § 40.77(3). In 1959, then, a person charged with a violation of sec. 40.77(1), Stat., was entitled to use the disobedience of the child as a defense. 1959 Wis. Stat. § 40.77(3).

In 1967, the legislature reviewed this language and removed it. The legislature directed the education committee to revise and codify the statutes regarding public schools. 1967 Wis. Laws c. 92, page 304, Prefatory Note. In overhauling the laws regarding public schools, the intentions of the appointed subcommittee were made clear:

"It was the primary goal of the subcommittee to make the school laws readily understandable to legislators, school boards, school administrators and the general public. In accordance with its directive, the subcommittee adhered to the following guidelines in completing its assignment:

- (1) Reorganize the school laws in a more logical manner.

- (2) Restate clearly the language in the various sections.
 - (3) Eliminate obsolete material
 - (4) Remove ambiguities and conflicts.”
- 1967 Wis. Laws c. 92, page 305, Prefatory Note.

In accordance with these goals, the legislature removed the language “shall be a good defense” and replaced it with “shall be dismissed.” App. 106. A review of the Wisconsin Drafting Records reveal that this change was not made accidentally. The Drafting Records show that the language “shall be a good defense” was crossed out by hand and the language “this action shall be dismissed” was added in the margin with a circle around it. *Id.*

The newly created sec. 118.15, Stat., revealed five subparts, rather than the three contained in sec. 40.77, Stat. The final subpart laid out the penalties for violating sec. 118.15(1), Stat., and provided for dismissal upon a showing that the disobedience of the child interfered with the defendant’s ability to comply with the law. 1967 Wis. Stat. § 118.15(5). No prior conviction was required and it’s clear that sec. 118.15(5), Stat., refers to a prosecution commenced under sec. 118.15(1), Stat.

The next notable change occurred in 1987 when the legislature relocated the previous language about the effect of disobedience of the child and made it into sec. 118.15(5)(b), Stat. 1987 Wis. Laws. Act 285 §§ 21-22. It was not until 10 years later, in 1997, that the legislature further subdivided sec. 118.15(5)(b), Stat. into two more parts, making the “shall be dismissed” language its own subpart. 1997 Wis. Laws. Act 239 §§ 10-15.

Throughout the years, the legislature has made its intent clear. While the location of the language has been changed from defense to dismissal and relocated, the legislature has always intended that it apply to all defendants who have been charged under the Compulsory School Attendance law. A conviction is not a prerequisite to triggering sec. 118.15(5)(b)(2), Stat.


CONCLUSION

The trial court erred in concluding that a conviction was a prerequisite to a hearing under sec. 118.15(5)(b)(2), Stat. Ms. McGee respectfully requests that this court reverse the order of the circuit court and remand the case to the trial court for a pre-trial

evidentiary hearing to determine if the child's disobedience prevented Ms. Ms. McGee from complying with the law.

Dated at Milwaukee, Wisconsin, this 19th day of September, 2004.

Respectfully submitted,


AMELIA L. BIZZARO
Attorney at Law
State Bar No. 1045709

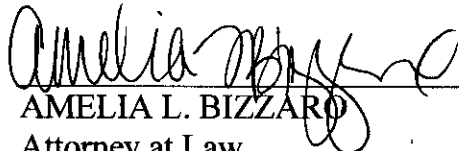
P.O. Box 511673
Milwaukee, Wisconsin 53203
Telephone (414) 793-5736

Attorney for Defendant-Appellant

CERTIFICATION

I certify that this brief meets the form and length requirements of Wis. Stat. §§ (Rules) 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum 60 characters per line. The text is 13-point type and length of the brief is 3,358 words.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Amelia Bizzaro", is written over a horizontal line.

AMELIA L. BIZZARO
Attorney at Law
State Bar No. 1045709

P.O. Box 511673
Milwaukee, Wisconsin 53203
Telephone (414) 793-5736

Attorney for Defendant-Appellant