STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 04-1005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

GWENDOLYN McGEE,

Defendant-Appellant.

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

REPLY BRIEF 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

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ARGUMENT

The State has conceded that the trial court erred in ruling that sec. 118.15(5)(b)(2), Stat., is not triggered unless there is a conviction under sec. 118.15(5)(a). ***See*** State's brief-in-chief at 3, 5. The state disagrees that the section in question requires a pretrial determination by the trial court, and instead argues that it creates an affirmative defense that, when raised by the defendant, should be determined by the trier of fact. ***Id.*** at 3-4.

While the state is on the right track in urging reversal of Judge Konkol's ruling, it argument still falls short.

I. SEC. 118.15(5)(b)(2) DOES NOT CREATE AN AFFIRMATIVE DEFENSE.

An affirmative defense raises "new facts and arguments that, if true, will defeat the plaintiff's or government's claims even if all allegations in the complaint are true[.]" Black's Law Dictionary (Pocket Edition 1996). An affirmative defense shifts the burden of persuasion to the defendant to prove facts other than those relating to the crime. ***State v. LaPlante***, 186 Wis. 2d 427, 435, 521 N.W.2d 448 (Ct. App. 1994). "An affirmative defense, however, is not an element of the offense." ***State v. Staples***, 99 Wis. 2d 364, 376, 299 N.W.2d 270 (Ct. App. 1980).

A. Control is More than Having the Legal Right and Duty to Control a Child.

The state argues that the language control of a child "applies to people who have the legal right and duty to control a child – the child's parents or guardians." In support of this argument, the state relies upon ***Bruttig v. Olsen***, 154 Wis. 2d 270, 276, 453 N.W.2d 153 (Ct. App. 1989). However, reliance on this case is misplaced and the state oversimplifies the element of control.

In ***Bruttig v. Olsen***, Brian Bruttig, an adolescent minor, was injured while playing snow-mobile tag with two other boys, and he sued the parents of each of the boys. ***Id.*** at 273. One of the boys' had parents, Rita and David Olsen, who were separated at the time of the accident. ***Id.*** at 274. David testified that while he had a responsibility and opportunity to supervise his son, Rita had physical custody. ***Id.*** The jury found Brian Bruttig the most negligent, but also appropriated negligence to each of the parents individually, finding David less negligent than Rita. ***Id.*** Brian Bruttig appealed arguing

that the negligence of David and Rita should be combined. ***Id.***

The court conducted a factual analysis in determining whether or not David's culpability was equal to that of his estranged wife's. The court noted that David was not present or living at home at the time of the accident. ***Id.*** at 277. Young Olsen hid the game of snow-mobile tag from his parents and the court found that the fact-finder could reasonably infer that "David had no knowledge of the danger and was not able...to discover it and exercise authority to stop it." ***Id.*** Rita, on the other hand, lived with the boys and her daily proximity to the boys gave her a greater opportunity to observe their behavior. ***Id.*** "Thus, even if the duties of the Olsen parents were considered equal, the opportunity to exercise them was not necessarily equal..." ***Id.*** at 278.

This court should apply a similar analysis to the case at bar. Control, an element of the offense, is determined by first evaluating whether or not the parent had a legal duty to exercise control and next, applying the facts of the case to determine whether or not the parent had the opportunity to exercise it. Thus, the element of control is three-part and in order to meet this element, the state would have to prove, beyond a reasonable doubt, that (1) the defendant was legally empowered and obligated to assert control, (2) the child was physically available to the defendant and (3) the defendant failed to cause the child to attend school regularly.

The only thing sec. 118.15(5)(b)(2), Stat., makes a matter of proof for the defendant is that the disobedience of the child precluded the exercise of control. However, the state must still prove that the exercise of control was not precluded by anything else, such as the child being taken away by the other parent, or the child being too sick to attend school.

Parents have a legal duty to send their kids to school. However, parents whose children behave disobediently in a manner outside of their control should have the opportunity to have the case dismissed before being subjected to a trial. Disobedience of the child goes directly to the third part of the control element. As a result, section 118.15(5)(b)(2), Stat. does not create an affirmative defense.

B. ***State v. White*** is Unpersuasive

The state relies on ***State v. White***, 180 Wis. 2d 203, 509 N.W.2d 434 (Ct. App. 1993) in support of its argument that the section creates an affirmative defense. However, ***White*** is not on point and is distinguishable from the case at bar.

In ***White***, the court was addressing whether or not the compulsory school attendance law was unconstitutionally vague. 180 Wis. 2d 203, 210. The ***White*** court found the law constitutional and only referred to White's defense in passing. ***Id.*** at 211, 218. The court did not address whether or not sec. 118.15(5)(b)(2), Stat. provided for a pretrial hearing, as White never raised that issue. As a result, ***White*** is not on point nor is persuasive in determining the issue currently before the court.

II. SECTION 118.15(5)(b)(2) PROVIDES FOR A PRETRIAL DETERMINATION OF THE CHILD'S DISOBEDIENCE.

The section in question provides that "[i]n 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..." Wis. Stat. § 118.15(5)(b)(2). The statute specifically provides that the matter shall be dismissed "in a prosecution[,]" indicating that the matter be decided pretrial.

The word dismissed – on its own-- indicates a pretrial determination as the word 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 (emphasis added).

A. The Statute Imposes a Duty on the Court to Timely Determine Whether the Child Should be Referred to Children's Court

A pretrial determination of disobedience is in line with the legislature's goals of keeping kids in school.[1] In addition to calling for dismissal of the action upon a showing of disobedience, sec. 118.15(5)(b)(2), Stat. calls for a referral of the child to the court assigned to exercise jurisdiction under chapter 48 (children's code). This referral provides the child with services and procedures, including a CHIPS petition, necessary to help combat the behavioral problems causing the truancy. A dismissal of the matter at the pretrial stage furthers the goals of the legislature by getting the child and parent the necessary services as early as possible, rather than waiting until after a trial has been conducted.

The language of the statute, including the contemplation of a CHIPS proceeding, suggests that there should be a mechanism for determining – pretrial – when a child's disobedience makes a CHIPS proceeding against the recalcitrant child preferable to a criminal proceeding against an ineffectual, but helpless parent.

The trial court, however, would not be without discretion in determining whether or not a pretrial hearing

[1] See generally Wis. Stat. § 118.01, which codifies the legislature's goals. The legislature's goal of keeping kids in school is further supported by sec. 118.16(5), Stat., which lays out the steps that must be taken before an action can be brought against a parent under sec. 118.15, Stat. The legislature has implemented several steps that must be first taken before bringing an action against a parent in order to first identify the reason's for a child's truancy and combat them, keeping the child in school.

should be held on the basis of disobedience. The pleading requirements of sec. 971.30, Stat., which lays out the requirements for filing a motion before trial would apply. As a result, the moving party would have to "[s]tate with particularity the grounds for the motion and the order or relief sought," regarding the disobedience of the child. The trial court would also have discretion in determining whether or not dismissal of the matter was with or without prejudice.

B. A Pretrial Determination of Disobedience as Required by Sec. 118.15(5)(b)(2) Does Not Create Constitutional Problems

The state has to prove every element of the offense beyond a reasonable doubt under the due process clause. ***State v. Harvey***,2002 WI 93 ¶ 5, 254 Wis. 2d 442, 647 N.W.2d 189. However, this clause is not violated by Ms. McGee's proposed construction, just as it is not violated when a defendant charged with obstructing an officer, for example, motions the court to suppress evidence pretrial.

Under sec. 946.41, Stat., "[w]hoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor." A defendant who motions to court to suppress evidence seized in his arrest or a statement made is essentially arguing that the officer did not act with lawful authority.

At the suppression hearing, the court takes testimony and under a lower burden of proof determines whether or not the evidence is admissible (i.e. whether it was taken with lawful authority). If the motion is denied, the defendant is not prevented from arguing at trial that the officer was not acting with lawful authority.

A pretrial hearing under sec. 118.15(5)(b)(2) , Stat. should be similarly conducted. At the disobedience hearing, Ms. McGee would have the opportunity to

present evidence that she was unable to comply with the law because of the disobedience of her son under a lower burden of proof. If the trial court finds that Ms. McGee has met her burden, the case would be ordered dismissed and her son referred to children's court. If the trial court finds that Ms. McGee has not met her burden, she can either chose to have a trial or enter a plea.

If Ms. McGee chooses to have a trial, she can present the same or similar evidence as presented at the disobedience hearing. Ms. McGee would not present this evidence as an affirmative defense the state would have to negate, but as a challenge to the element of control. Under this procedure, neither the 6th nor 14th Amendments are violated, as the state has suggested.

CONCLUSION

For the reasons stated above, Ms. McGee respectfully requests that this court reverse the order of the circuit court and remand the case to the trial court with instructions for conducting a pretrial hearing, pursuant to sec. 118.15(5)(b)(2), Stat. to determine if the child's disobedience prevented Ms. Ms. McGee from complying with the law.

Dated at Milwaukee, Wisconsin, this 13th day of December, 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 2,246 words.

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