STATE OF WISCONSIN
SUPREME COURT
Case No. 2010AP387-CR

STATE EX REL. OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

v.

WISCONSIN COURT OF APPEALS,

Respondent.

Petition for Review or, in the Alternative, Petition for a Supervisory Writ, of a Decision of the Court of Appeals, District II, In the Matter of Sanctions Imposed by the Court of Appeals in State v. Gregory K. Nielson, Case No. 08CF000982

APPELLATE PRACTICE SECTION OF THE STATE BAR OF WISCONSIN'S NONPARTY BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR REVIEW

Thomas M. Hruz
(State Bar No. 1041454)
MEISSNER TIERNEY FISHER & NICHOLS S.C.
111 East Kilbourn Ave., 19th Floor
Milwaukee, Wisconsin 53202
(414) 273-1300

G. Michael Halfenger
(State Bar No. 1024062)
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wis. 53202-5306
(414) 271-2400

Anne Berleman Kearney
(State Bar No. 1031085)
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

On behalf of the Appellate Practice Section of the State Bar of Wisconsin

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The Appellate Practice Section of the State Bar of Wisconsin ("the Section") files this brief as amicus curiae in support of the State Public Defender's Petition for Review or, in the Alternative, Petition for Supervisory Writ ("the Petition"). Such review will enable this Court to address the circumstances in which it is appropriate for the Court of Appeals to impose sanctions on parties or their counsel for violations of procedural rules and the process for its doing so.

The Section consists of state bar members who have a particular interest in appellate practice and the work of the appellate courts. It regards the appellate courts and the lawyers who practice in front of them as collaborators in the system of justice. The Section's interest is in circumstances where a lawyer has endeavored in good faith to comply with appellate rules and has made a judgment call in the process (e.g., as to whether to include certain pages from the case record in the appendix), but an appellate court has reason to believe a rule has been violated. The Section submits that such a situation should be handled more appropriately than the current process, in which the Court of Appeals summarily sanctions counsel (or litigants) by announcing a fine in the court's decision on the merits. Specifically, litigants or their counsel should be given an opportunity to be heard prior to the imposition of a sanction.

The Petition presents an important opportunity for this Court to address the foregoing concerns and thus meets the criteria for granting review under Wis. Stat. § 809.62(1r). This matter is one of statewide importance as it involves the courts' relationships with their officers—the counsel who appear before them. In deciding this case, the Court will be setting statewide policy related to the fair and efficient administration of the appellate process. This case provides an important opportunity for the Court to announce procedures that enable appellate counsel to zealously represent their clients and, where necessary, fairly explain their conduct in this State's appellate courts, all while safeguarding the appellate courts' ability to enforce their rules.

ARGUMENT

The Petition urges the Court to consider the process by which appellate courts impose sanctions upon counsel or litigants for alleged violations of procedural rules. The issue is pressing and important. Increasingly, the Court of Appeals has imposed sanctions for alleged violations of those rules. *See, e.g., Post v. Winters Group, LLC,* No. 2009AP2665, 2010 WL 3768059, unpublished slip op. at ¶ 7 (WI App Sept. 29, 2010) ("false certification and omission of essential record documents in the appendix," $150 fine); *State v. Ballenger*, No. 2010AP664-CR, 2010 WL 4633466, unpublished slip

op. at ¶ 5 n.3 (WI App Nov. 16, 2010) ("brief's appendix does not include any portion of the suppression motion hearing transcript" and "false certification," $50 fine); State *v. Voeller*, 2010 WI App 120, ¶ 9 n.3, 329 Wis. 2d 270, 789 N.W.2d 754 ($150 sanction against State for a "false appendix certification"); *State v. Zurkowski*, 2010 WI App 100, ¶ 23, 327 Wis. 2d 798, 788 N.W.2d 383 ("providing a deficient appendix and a false certification," $150 sanction). What's more, such sanctions are being pronounced in the very opinions deciding the merits of the appeal, necessarily impugning the alleged offending counsel. Often these sanctions are imposed for violations of rules (that is, the requirements of Wis. Stat. § 809.19(2)(a), at issue in this appeal), which by their language tolerate reasonable differences of opinion over what is required.

This case meets the criteria for review under Section 809.62(1r). In deciding this case, the Court can clearly articulate a policy uniquely within its authority to address and thereby better guide the Court of Appeals and appellate practitioners in this State concerning adherence to procedural appellate rules and the process for determining whether a violation warrants sanctions. Such review by this Court is especially appropriate because the imposition of these sanctions without an opportunity to be heard (e.g., via an order to show cause) appears to be motivated more by a policy shift of the

Court of Appeals than the particular facts of any given case or a rulemaking amendment to the language of the applicable rules. The Section submits the policy at issue here is of sufficient importance to warrant this Court's ruling on the matter.

In this context, the Section and its membership seek an understanding that the occasion of a rules violation is not always self-evident. In these circumstances, it makes sense for a brief dialogue to occur between court and counsel—collaborators in the justice system—as to whether, in fact, a rules violation has occurred before a party or its counsel is to be sanctioned. That can only happen if there is notice to the litigant (and counsel) and an opportunity to be heard.[1]

The Section urges an approach that considers the interests of both the appellate courts and litigants (and their counsel). This involves taking into account the interests of appellate courts in being able to impose sanctions in an informed and fair manner, as well as protecting the interests of well-intending (and often quite

[1] Indeed, the rule at issue in this Petition directs counsel to have its appendix be "short" and to contain "*limited* portions of the record *essential* to an understanding of the issues raised." Wis. Stat. § 809.19(2)(a) (emphasis added). Under this directive, well-meaning counsel could, at once, be concerned with (1) the Scylla of overburdening the court with an appendix containing either less-limited portions of the record or portions not essential to understanding the issues raised, and (2) the Charybdis of failing to include sufficient portions of the record. Counsel face the threat of sanctions in either context. This dilemma only further highlights the wisdom of requiring notice and an opportunity to be heard before sanctions are imposed.

competent) appellate counsel in not being summarily and publicly reprimanded for an alleged rule violation.

For these reasons, the Section asks that this Court articulate a rule whereby at least some basic, yet meaningful, opportunity to be heard is afforded before sanctions are imposed. The proposed rule is similar to the one this Court articulated in *Howell v. Denomie*, 2005 WI 81, ¶ 19, 282 Wis. 2d 130, 698 N.W.2d 621: notice of a perceived violation of an appellate rule must be afforded, by way of an order to show cause; and the litigant (and its counsel) alleged to have committed a violation shall have an opportunity to respond before sanctions are imposed, which, at a minimum, shall be the opportunity for an explanation in writing. *Cf. Kunz v. DeFelice*, 538 F.3d 667, 674, 682 (7th Cir. 2008) (noting the Seventh Circuit "regularly fines lawyers who violate" the court's rule requiring appellant to file an appendix containing the judgment and other relevant pleadings "yet falsely certify compliance," and affording counsel an opportunity "to show cause why they should not be fined or otherwise disciplined for this violation").

The Section believes that such an approach affords due process and is otherwise grounded in sound policy. It is consistent with other Wisconsin rules that govern the imposition of sanctions (e.g., Wis. Stat. § 802.05(3)), and advances the due process principle

that notice and the opportunity to be heard should precede the imposition of sanctions. *See Roadway Express Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). Moreover, the proposed rule properly balances (1) the interests of litigants and appellate counsel in not being publicly sanctioned for alleged rules violations without an opportunity to be heard with (2) the need of the appellate courts to fairly and efficiently administer the courts and ensure all parties conform to their rules.

The Section does not look to serve as an apologist for parties or practitioners who willfully or plainly violate this State's rules of appellate procedure. Likewise, the Section looks not to weigh in on the merits of any particular alleged rule violation. Rather, the Section believes that the current process of imposing sanctions for rule violations, where there may be reasonable differences of opinion between attorneys and the court, without an opportunity to be heard is fundamentally both flawed and bad policy.

CONCLUSION

For the foregoing reasons, the Section, with the unanimous approval of the Board of Governors of the State Bar of Wisconsin, respectfully requests that this Court grant the State Public Defender's Petition for Review or, in the Alternative, Petition for Supervisory Writ.

Dated: February 23, 2011.

Respectfully submitted,

_____

On behalf of the Appellate Practice Section of the State Bar of Wisconsin

Thomas M. Hruz (WBN 1041454)
Meissner Tierney Fisher & Nichols S.C.
111 East Kilbourn Avenue, 19th Floor
Milwaukee, Wis. 53202
(414) 273-1300

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
P.O. Box 2145
Milwaukee, Wis. 53201-2145
(414) 332-0966

G. Michael Halfenger (WBN 1024062)
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wis. 53202-5306
(414) 271-2400

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a nonparty brief and appendix produced with a proportional serif font. The length of this brief is 1,399 words.

_____
Thomas M. Hruz

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed: Thomas M. Hruz

Signature: _____

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2011 I caused the requisite copies of the foregoing nonparty brief to be served on the following individuals by properly addressed, postage-prepaid first-class mail.

_____
Thomas M. Hruz

Joseph N. Ehmann
First Assistant State Public Defender
Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Mark Neuser
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Beth Ermatinger Hanan
Gass Weber Mullins LLC
309 North Water Street
Milwaukee, WI 53202

Robert R. Henak
Rebecca R. Lawnicki
Henak Law Office, S.C.
316 N. Milwaukee St., #535
Milwaukee, WI 53202

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791 N.W.2d 405, 2010 WL 3768059 (Wis.App.), 2010 WI App 145
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 791 N.W.2d 405, 2010 WL 3768059 (Wis.App.))

Court of Appeals of Wisconsin.
Sharon L. POST, Plaintiff-Respondent,
v.
The WINTERS GROUP, LLC and Robert J. Schulz, Defendants-Appellants.

No. 2009AP2665.
Sept. 29, 2010.

Appeal from a judgment of the circuit court for Waukesha County: Ralph M. Ramirez, Judge. *Affirmed.*

Before BROWN, C.J., NEUBAUER, P.J., and ANDERSON, J.

¶ 1 PER CURIAM.

*1 The Winters Group, LLC (TWG) and Robert J. Schulz appeal from a judgment in favor of Sharon L. Post for the $9500 she paid TWG for a bathroom and sunroom addition to her home. They argue that under a written contract Post is required to arbitrate her dispute with TWG and that Post cannot recover double damages and attorney fees under WIS. STAT. § 100.20(5) (2007-08).[FN1] We affirm the judgment on the circuit court's finding that despite Post's signature on the written agreement, no contract was formed which requires arbitration and TWG's admission, by default, of the allegations in the complaint.

FN1. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶ 2 Post commenced this action alleging that she met with a salesman from TWG to discuss a bathroom and sunroom addition to her home, that she was presented with a Remodeling Construction Agreement to which she made a counteroffer, and that she gave the salesman a check for $9500, representing a ten percent deposit on the total project cost. She further alleged that she never received an accepted counteroffer on the contract nor any completed plans for the addition to her home. TWG refused to return Post's money when she withdrew her counteroffer. Post alleged that TWG had engaged in unfair trade practices prohibited by WIS. STAT. § 100.20 and WIS. ADMIN. CODE § ATCP 110, by making a claim of a binding contract when no final agreement had been reached, by accepting payment for home improvement services which TWG did not intend to provide, by failing to give notice of delay in the performance of services, by using Post's payment for purposes other than providing materials or services in her home improvement project, and by failing to provide Post with a copy of the contract before performing any work or accepting payment. Post also stated a theft cause of action.

¶ 3 TWG did not file an answer to the complaint. Rather, it filed a motion to compel arbitration under a Design/Development Agreement signed by Post.[FN2] Pursuant to WIS. STAT. § 788.03, trial to the court was had on whether the parties had an agreement to arbitrate. At trial Post testified that she made handwritten revisions to the agreement both on the face of the document and on separate pieces of paper.[FN3] TWG's salesman confirmed that Post had requested modification of the contract and he told her he would have to get the changes approved by his boss, Robert J. Schulz, TWG's business manager. Post testified that the salesman returned a few days later to collect Post's deposit and indicated that Post would receive the final, typed, clean version of the agreement the next day. She never received the written contract. The circuit court found that there had been no meeting of the minds between Post and TWG on the terms of the written agreement and, consequently, no contract for arbitration had been formed.

FN2. Just days after the motion to compel arbitration was filed, Post moved to strike the motion and for default judgment. The circuit court held both the motion to compel arbitration and motion for default judgment in

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> abeyance pending the outcome of the trial under WIS. STAT. § 788.03.
>
> FN3. Post wanted to strike the arbitration clause and wanted to add language requiring TWG to obtain city zoning approval.

¶ 4 TWG relies on the parol evidence rule and argues that, because there was no ambiguity in the signed written contract, no extrinsic evidence outside the four corners of the document is admissible. It points to the integration clause in the contract as barring the same type of evidence. Although the parol evidence rule excludes evidence to alter or vary the terms of contracts reduced to writings and intended to embody the final expression of an agreement between parties, it is always admissible to determine whether the parties intended a writing to be a final and complete expression of their agreement. *Brevig v. Webster*, 88 Wis.2d 165, 172-73, 277 N.W.2d 321 (Ct.App.1979). Here, the evidence TWG seeks to exclude was offered on the issue of whether the parties had formed a contract and satisfied the essential element of a meeting of minds. This was not a contract interpretation question. The parol evidence rule is not implicated on the question of whether a contract was formed. *See Bunbury v. Krauss*, 41 Wis.2d 522, 529, 164 N.W.2d 473 (1969). All relevant evidence, whether parol or otherwise, is admissible in determining whether a contract was made. *Id.*

*2 ¶ 5 TWG highlights certain evidence it believes confirms Post's execution of the written agreement. It points out that the written agreement did not include most of the handwritten notations Post testified that she made or wanted to the agreement. At best this is a challenge to circuit court's findings. Where, as here,

> there is the assertion that a writing offered as a completely integrated contract was not assented to as an accurate or complete statement of agreed terms, the assertion may or may not be worthy of belief. Under the rules of this court, whether the evidence is credible is a question to be determined by the trier of the facts, in this case the circuit judge. In the event the trial judge gives credence to the testimony, as he did here, that the written contract was not assented to, and the testimony to that effect is not contrary to the great weight and clear preponderance of the evidence, the court's finding will be sustained....

Id. at 530, 164 N.W.2d 473. *See also* WIS. STAT. § 805.17(2) (a circuit court's findings of fact shall not be set aside unless clearly erroneous). The testimony of Post and TWG's salesman was accepted as credible by the circuit court. The circuit court's findings are not clearly erroneous, and the conclusion that the written contract was not enforceable is affirmed.[FN4]

> FN4. Because no contract was formed, we need not address TWG's additional argument that the Wisconsin Arbitration Act requires broad enforcement of the arbitration clause in the contract.

¶ 6 TWG argues that if no contract was formed, it would be impossible to have a violation of WIS. ADMIN. CODE § ATCP 110, which by definition, is dependent on a contract for home improvement services. *See* § ATCP 110.01(4) ("[h]ome improvement contract" means "an oral or written agreement between a seller and an owner ... of residential ... property to perform labor or render services for home improvements"). It also argues that at most there was an agreement for design services only and not physical work performed upon the home as required by the definition of "home improvement" in § ATCP 110.01(2). TWG defaulted in answering the complaint and thereby the allegations of the complaint are deemed admitted. *See Estate of Otto v. Physicians Ins. Co. of Wis., Inc.*, 2008 WI 78, ¶ 55, 311 Wis.2d 84, 751 N.W.2d 805; WIS. STAT. § 802.02(4). Consequently, TWG admitted it was retained for a home improvement service and that it engaged in conduct which violated WIS. STAT. § 100.20 and § ATCP 110. TWG cannot now claim otherwise. The award of double damages and attorney fees is affirmed.

¶ 7 The appellant's brief contains the required certification by counsel, Attorney Everett Wood, that the appendix contains the "findings or opinion of the circuit court" and "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." *See* WIS. STAT. RULEE 809.19(2)(a). However, the appellant's appendix fails to include the final judgment and the

transcript of the circuit court's oral findings and ruling on which the judgment is based. At a minimum the transcript of the oral ruling is essential to understand the issues. Consequently, we conclude that Wood filed a false certification. Counsel's false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and "is grounds for imposition of a penalty." *State v. Bons*, 2007 WI App 124, ¶ 25, 301 Wis.2d 227, 731 N.W.2d 367 (quoting WIS. STAT. RULE 809.83(2)). Accordingly, we sanction Wood and direct that he pay $150 to the clerk of this court within thirty days of the release of this opinion.

***3** Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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Post v. Winters Group, LLC
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Slip Copy, 2010 WL 4633466 (Wis.App.)
(Cite as:)

Only the Westlaw citation is currently available.

NOTICE: FINAL PUBLICATION DECISION PENDING. SEE W.S.A. 809.23.

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,
v.
Michael E. BALLENGER, Defendant-Appellant.

No. 2010AP664-CR.
Nov. 16, 2010.

Appeal from a judgment of the circuit court for Marathon County: Gregory E. Grau, Judge. *Affirmed; attorney sanctioned.*

¶ 1 HOOVER, P.J.[FN1]

FN1. This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Michael Ballenger appeals a judgment of conviction for third-offense operating with a prohibited alcohol concentration. Ballenger argues a delay during the course of the traffic stop exceeded the time limits of a *Terry* stop.[FN2] We reject Ballenger's undeveloped assertion and affirm.

FN2. *See Terry v. Ohio*, 392 U.S. 1 (1968).

BACKGROUND

¶ 2 While on patrol on a rural Marathon County road shortly after midnight, deputy Brian Campbell passed an oncoming vehicle that appeared to be traveling outside the fog line. Campbell turned his squad car around to observe the vehicle and then saw the vehicle drive into the oncoming traffic lane by half the car width. After the vehicle made a sudden turn onto a side road when Campbell caught up to it, Campbell stopped the vehicle.

¶ 3 When Campbell made contact with the driver, identifying him as Ballenger, Campbell smelled the odor of intoxicants from within the vehicle and observed Ballenger's eyes were bloodshot and glassy. Ballenger admitted he was coming from the Coral Bar and that he had consumed approximately five beers while there. Ballenger also requested that Campbell give him a ride home. Deputy Campbell then returned to his squad and ran Ballenger's information with dispatch.

¶ 4 Dispatch informed Campbell that Ballenger had a "caution indicator" listed on the in-house records. A caution indicator is designed to inform officers that a person has prior police contacts involving unsafe behavior, such as fighting with officers. Additionally, Campbell had a previous contact with Ballenger involving firearms being removed from Ballenger's residence, and was aware of several other incidents at the residence involving weapons. Rather than returning to Ballenger's vehicle and conducting field sobriety tests, Campbell requested back-up out of concern for his safety. It took the back-up squad car fifteen to twenty minutes to arrive. Ballenger was eventually arrested for operating while intoxicated.

¶ 5 Ballenger moved to suppress all evidence, arguing Campbell unreasonably prolonged the duration of the traffic stop. The court denied the motion, concluding that, at the time of the backup request, Campbell already had probable cause to arrest Ballenger for operating while intoxicated and, further, the request and delay were reasonable under the totality of the circumstances.[FN3] Ballenger pled guilty to operating with a prohibited alcohol concentration of .15. Ballenger now appeals.

FN3. Ballenger's brief's appendix does not include any portion of the suppression motion hearing transcript-neither deputy Campbell's testimony nor the court's factual findings or reasoning for denying the motion. Yet, as required by rule, counsel certified to this court that his appendix contains "the findings or opinion of the circuit court [and] 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 is-

sues." *See* WIS. STAT. RULEE 809.19(2)(a), (b). "Filing a false certification with this court is a serious infraction" justifying the imposition of sanctions. *State v. Bons*, 2007 WI App 124, ¶¶ 23-25, 301 Wis.2d 227, 731 N.W.2d 367. We therefore direct Ballenger's counsel to pay $50 to the clerk of this court within thirty days of the date of this decision.

DISCUSSION

¶ 6 Ballenger argues Campbell unreasonably prolonged the duration of the *Terry* traffic stop. Ballenger fails, however, to even describe a *Terry* stop as a temporary investigative stop, much less cite a single case addressing the proper scope or duration of *Terry* stops. Ballenger also fails to mention or address the circuit court's conclusion that Campbell already had probable cause to arrest him at the time Campbell created the delay by requesting backup. Therefore, we conclude Ballenger, despite requesting multiple extensions of time to file his brief, failed to articulate an argument sufficient to require our review. *See State v. Flynn*, 190 Wis.2d 31, 39 n. 2, 527 N.W.2d 343 (Ct.App.1994) (appellate court may decline to address issues that are inadequately briefed; arguments that are not supported by legal authority will not be considered).

¶ 7 Further, after the State responded with an argument including citations to, and analysis of, cases concerning the duration of *Terry* stops, Ballenger failed to file a reply brief and address those arguments. We deem Ballenger's failure to reply as a concession. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments are deemed conceded). In any event, were we to reach the merits of Ballenger's argument, we would conclude the delay was reasonable under the totality of the circumstances.

Judgment affirmed; attorney sanctioned.

This opinion will not be published. *See* WIS. STAT. RULEE 809.23(1)(b)4.

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