Appeal No. 2010AP2514-CR **Cir. Ct. No. 2008CF120**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. ZIEGLER,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In ***State v. Bowden***, 2007 WI App 234, 306 Wis. 2d 393, 742 N.W.2d 332, we analyzed WIS. STAT. § 948.31(2), which deals with criminal charges for interference with custody of children. There, we stated that withholding custody of a child "addresses a situation where the person who takes the child has some initial permission to do so." We certify to ask the supreme court to determine whether ***Bowden***'s interpretation is contrary to the plain language of the statute.

DISCUSSION

Scott E. Ziegler appeals his conviction for one count of repeated sexual assault of a child, one count of interference with child custody, two counts of child enticement, one count of second-degree sexual assault by use of force, two counts of child abuse, and seven counts of second-degree sexual assault of a child. The charges stem from his interactions with several teenage girls. He raises several issues, but in this certification, we only address his argument that there was insufficient evidence to convict him for interference with child custody. That conviction was based on a time when he allowed a runaway minor to stay with him for several days. At the time, he was a stranger to the mother of the child, who therefore did not give him any sort of permission to take or look after her daughter.

Ziegler's argument is simple: he contends that based on the language in ***Bowden***, the conviction must be overturned because he never had "initial permission" from the minor's mother. *See* ***Bowden***, 306 Wis. 2d 393, ¶18. The State counters that the language Ziegler relies on is dicta, and the plain language of WIS. STAT. § 948.31(2) contains no "initial permission" requirement.

WISCONSIN STAT. § 948.31(2) states that "[w]hoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents … without the consent of the parents, the mother or the father with legal custody, is guilty of a Class I felony." We agree with the State that there is nothing in the statutory language to indicate that in order to withhold custody from a parent, a defendant must have had "initial permission" from the parent to take the child. *Compare* ***Bowden***, 306 Wis. 2d 393, ¶18, *to* § 948.31(2). ***Bowden***'s interpretation seems to add language to the statute (and an element to the crime),

which is something we may not do. *See* ***Cavey v. Walrath***, 229 Wis. 2d 105, 111, 598 N.W.2d 240 (Ct. App. 1999). However, despite our disagreement with ***Bowden***'s interpretation, we are bound by it unless it is dicta. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 256 (1997) ("only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals").[1]

We did not intend for our reasoning in ***Bowden*** to be dicta. Instead, "when an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not dicta but is a judicial act of the court which it will thereafter recognize as a binding decision." ***State v. Sanders***, 2007 WI App 174, ¶25, 304 Wis. 2d 159, 737 N.W.2d 44, *aff'd on other grounds*, 2008 WI 85, 311 Wis. 2d 257, 752 N.W.2d 713.[2] In ***Bowden***, we analyzed whether Bowden could be convicted of causing two boys to "leave" their parents after he convinced them, over their initial objections, to come with him rather than walking straight home from school. ***Bowden***, 306 Wis. 2d 393, ¶¶2-3, 11. Bowden argued he did not cause the children to leave their mother because they were not with their mother when the incident occurred. ***Id.***, ¶17. Specifically, he

[1] We candidly admit that two of the three judges to this certification were members of the panel in ***State v. Bowden***, 2007 WI App 234, 306 Wis. 2d 393, 742 N.W.2d 332. We also point out that the condition precedent of "initial permission" as a necessary component of "withholding a child more than 12 hours" was the argument of the State, which argument we agreed with and adopted. Of course, now the State expresses a contrary view.

[2] We recognized that ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶52 & n.19, 324 Wis. 2d 325, 782 N.W.2d 682, highlighted two competing lines of cases regarding the definition of dicta. ***State v. Sartin***, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996), defines dictum as "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." Under either definition, we do not think the ***Bowden*** statements cited by Ziegler, ***Bowden***, 306 Wis. 2d 393, ¶18, are dicta.

claimed that the language "withholds a child for more than 12 hours" supported his interpretation because it "shows that the legislature contemplated situations where the child is not with the parent so, implicitly, the other two methods of interference must apply only to those situations where the child initially *is* with the parent." ***Id.*** We disagreed.

Instead, we stated that the withholding method of interference was focused on permission, not the parent's presence:

> The withholding method addresses a situation where the person who takes the child has some initial permission to do so. The other two methods speak to situations where the parent has given no permission to the person who "causes a child to leave" or "takes a child away." *See* WIS. STAT. § 948.31(2). Bowden's argument that "causes ... to leave" means from the parent's actual presence suggests that parental custody ends when the child is out of the parent's presence. Without commenting on the merit of that position, to adopt it would require that we add words to the statute that are not there. We decline to do so.

Id., ¶18 (citation omitted). So, in ***Bowden***, the "withhold[ing] a child" language in § 948.31(2) was central to the defendant's argument and our interpretation of it was the basis of our analysis of the statute in that case. In other words, we intentionally took up Bowden's argument, decided it in a manner consistent with the State's position and it was therefore germane to the issue in controversy. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶52 n.19, 324 Wis. 2d 325, 782 N.W.2d 682 (citations omitted). It was also "essential to the determination" of the issues before us. *See* ***id.***

Thus, we are left with two options. We may follow ***Bowden*** and express our disagreement with it or we may certify. ***Cook***, 208 Wis. 2d at 190. In this case, following ***Bowden*** would require us to overturn a conviction that we think is statutorily sound. And although Ziegler raises three other issues, our

review of the case leads us to conclude we could not decide it without reaching this one. We therefore respectfully certify this case to the supreme court.