165 JUDICIALLY NOTICED FACTS

CAUTION: IT IS ERROR TO GIVE THIS INSTRUCTION AS TO FACTS THAT CONSTITUTE AN ELEMENT OF THE CRIME.

The court has taken judicial notice of certain facts and you are directed to accept the following as true:

[state facts judicially noticed]

COMMENT

Wis JI-Criminal 165 was originally published in 1966 and revised in 1983. It was republished without substantive change in 1991 and 2000. This revision was approved by the committee in December 2002.

The Committee recommends giving this instruction at the time judicial notice is taken and as part of the instructions at the end of the case.

Section 902.01 of the Wisconsin Rules of Evidence addresses judicial notice.

The caution at the top of the instruction was added in response to the decision in State v. Harvey, 2002 WI 65, 254 Wis.2d 442, 649 N.W.2d 189, which held that it is error to give a judicial notice jury instruction as to facts that constitute an element of the crime. In Harvey, the defendant was charged with possession of cocaine with intent to deliver "within 1,000 feet of Penn Park." The state rested without introducing proof that Penn Park was a city park. Harvey moved for a directed verdict on the penalty enhancer and the state moved to reopen. The trial judge denied both motions, but took judicial notice that Penn Park was a city park. The judge instructed the jury that "[t]he Court has taken judicial notice of certain facts and you are directed to accept the following as true: Penn Park is a city park located in the City of Madison, Dane County, Wisconsin."

The Wisconsin Supreme Court held that the facts constituting the "within 1,000 feet of . . ." penalty enhancer under § 961.49 are the same as elements of the crime, and that the jury instruction on judicially noticed facts directed a verdict on an element. "This had the effect of not merely undermining but eliminating the jury's opportunity to reach an independent, beyond-a-reasonable-doubt decision on that element, and was therefore constitutional error." 2002 WI 65, ¶34. But the error was harmless: because the fact was "undisputed and indisputable . . . it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found the defendant guilty of the enhanced offense." 2002 WI 65, ¶48.

The decision did not hold that it was improper for the trial court to take judicial notice of status of the park and did not directly state that the jury instruction provision of the judicial notice statute – § 902.01(7) – was unconstitutional. The decision did hold that implementing sub. (7) as to an element of the crime is a due process violation.

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Section 902.01(7) differs from the federal version of the comparable evidence rule as it is applied in criminal cases. While the Wisconsin provision states that the judge "shall instruct the jury to accept as established any facts judicially noticed" without distinguishing between civil and criminal cases, the federal version provides that the jury in a criminal case is to be instructed that it "may, but is not required to, accept as conclusive any fact judicially noticed." Federal Rule of Evidence 201(g). The court in Harvey declined to rewrite the Wisconsin rule to follow the federal approach. 2002 WI 65, ¶34.

In light of Harvey, the continued viability of the holding in State ex rel. Cholka v. Johnson, 96 Wis.2d 704, 713, 292 N.W.2d 841 (1980), is doubtful. The case holds that it was proper for the trial court to take judicial notice of the fact that Southern Comfort is an intoxicating liquor and that excessive consumption of an intoxicating liquor can cause death.

"A trial court . . . may . . . take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual." State v. Peterson, 222 Wis.2d 449, 457, 588 N.W.2d 84, (Ct. App. 1998). Thus, it was error for a trial judge to "rely on his own experience on the river at night to determine whether the videotape was an accurate portrayal of the demonstration." 222 Wis.2d 449, 458.

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