

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 15, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 99-0108**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE RETURN OF PROPERTY IN  
STATE OF WISCONSIN V. JAMES OSWALD:**

**ARTIS BENNINGER,**

**APPELLANT,**

**V.**

**STATE OF WISCONSIN,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Waukesha County:  
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. In November 1995, Artis Benninger filed an application under § 968.20, STATS., 1995-96,<sup>1</sup> seeking the return of property allegedly owned by her but seized by the State as a result of the investigation and prosecution of her nephew, James Oswald.<sup>2</sup> The circuit court denied the application for the return of the property. We affirm.

¶2 Section 968.20(1), STATS., provides:

(1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 951.165, returned if:

(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or

(b) All proceedings in which it might be required have been completed.

¶3 After an evidentiary hearing, the circuit court found that the property requested by Benninger was property which the State had not introduced into evidence at the 1995 trial. The court acknowledged Benninger's claim that Oswald had assigned his rights in this property to her. However, the court held that it need not address Benninger's ownership claims because Oswald's appellate process had not concluded. Therefore, under § 968.20(1)(a) and (b), STATS., the

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<sup>1</sup> All future references will be the 1995-96 version of the statute unless otherwise indicated.

<sup>2</sup> Oswald was convicted of multiple felonies in May 1995.

property might be needed as evidence and all proceedings in which the property might be required have not been completed. Specifically, the court speculated that in the event Oswald's convictions are reversed, the State might need this property as evidence on retrial.

¶4 On appeal, Benninger argues that the items she seeks are not necessary for future proceedings because the district attorney previously announced that many of the items were slated for disposal. However, after Benninger made her formal application for return of the property, the district attorney stated his opposition to returning the property because the property might be necessary for retrial.

¶5 Benninger focuses her appellate argument on the district attorney's change of heart as to the need to retain the property. However, we review the circuit court's order denying the application for return of property, not the district attorney's position on the issue. Section 968.20, STATS.,<sup>3</sup> permits the State to retain possession of property that could be used as evidence pending completion of all proceedings. It was undisputed that Oswald's postconviction and appellate proceedings were ongoing at the time Benninger applied for the property to be returned. Therefore, we affirm the circuit court's ruling that § 968.20 does not require return of the property to Benninger.

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<sup>3</sup> Construction of § 968.20, STATS., presents a question of law which we decide independently. See *State v. Mueller*, 201 Wis.2d 121, 132, 549 N.W.2d 455, 460 (Ct. App. 1996).

*By the Court.*—Order affirmed.

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

