FILE COPY

BEFORE THE STATE OF WISCONSIN
FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF THE APPLICATION FOR THE APPRENTICE PERMIT OF RODD J. BURTON, APPLICANT.	:	FINAL DECISION AND ORDER

The State of Wisconsin, Funeral Directors Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Hearing Examiner, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Hearing Examiner, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Funeral Directors Examining Board. Let a copy of this order be served on the respondent by certified mail.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and to petition for judicial review are set forth on the attached "Notice of Appeal Information".

Dated this 20th day of June, 1988.

Chair

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Funeral Directors Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Funeral Directors Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Funeral Directors Examining Board.

The date of mailing of this decision is June 28, 1988.

WLD:dms
886-490

STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF THE APPLICATION FOR THE APPRENTICE PERMIT OF RODD J. BURTON, APPLICANT.	: : : : :	PROPOSED DECISION

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53 are:

Rodd J. Burton
P.O. Box 1531
Rhinelander, WI 54501

Funeral Directors Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

The above-captioned matter was commenced as a Class 1 proceeding within the meaning of Wis. Stats. sec. 227.01(3)(a), by the filing of a Notice of Hearing on January 14, 1988. The Notice of hearing indicated that the purpose of the proceeding was to provide the applicant, Rodd J. Burton, with a formal hearing upon the decision of the Funeral Directors Examining Board to deny his application for a certificate for apprenticeship as a funeral director.

The record in this case consists of written submissions made to the examiner by the applicant and Steven M. Gloe, the attorney for the Department of Regulation and Licensing, Division of Enforcement. All submissions were received by the examiner by April 8, 1988.

Based upon the record herein, the examiner recommends that the Funeral Directors Examining Board adopt as its final decision in this case, the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Rodd J. Burton, hereinafter referred to as "Burton," the applicant herein, filed a funeral director apprentice application under date of October 1, 1987.

2. On August 11, 1982, in Circuit Court for Ozaukee County, Court Case No. 82-CR-462, Burton was convicted of felony theft under Wis. Stats. sec. 943.20(1)(b). Pursuant to the conviction, Burton was placed upon probation.

3. On September 23, 1985 in Circuit Court for Ozaukee County, Court Case No. 85-CF-52, 82-CR-462, Burton was convicted of felony extortion under Wis. Stats. sec. 943.30(1). Pursuant to this conviction and the revocation of Burton's probation regarding the conviction set forth in paragraph 2 above, Burton was sentenced to prison for an indeterminate total term of not more than 5 years.

4. On November 12, 1985 in Circuit Court for Dane County, Court Case No. 83CF1496, Burton was convicted of felony burglary under Wis. Stats. sec. 943.10(1)(a). Pursuant to the conviction, Burton was sentenced to prison for an indeterminate term of not more than "5 years concurrent with sentence now serving."

5. The circumstances of convictions for felony theft, felony extortion and felony burglary are substantially related to the circumstances of the practice of an apprentice funeral director.

CONCLUSIONS OF LAW

1. The Funeral Directors Examining Board has jurisdiction in this proceeding pursuant to Wis. Stats. sec. 445.095.

2. In having been convicted of the crimes set forth in the Findings of Fact, Burton has been convicted of crimes the circumstances of which are substantially related to the practice of an apprentice funeral director.

3. Pursuant to Wis. Stats. secs. 445.095 and 111.335, the Funeral Directors Examining Board may deny an application to practice as an apprentice funeral director of any person who has been convicted of crimes substantially related to the practice of an apprentice funeral director.

ORDER

NOW, THEREFORE, IT IS ORDERED that the application of Rodd J. Burton to practice as an apprentice funeral director in the State of Wisconsin shall be, and hereby is, denied.

OPINION

The applicant, Rodd J. Burton, was denied a certificate to practice as an apprentice funeral director in the State of Wisconsin by the Funeral Directors Examining Board. The board's determination was based upon its finding that Mr. Burton had been convicted of crimes substantially related to the practice of an apprentice funeral director. Mr. Burton requested a hearing upon the denial. Accordingly, a Notice of Hearing was issued for the purpose of providing Mr. Burton with an opportunity to contest the denial determination. Since Mr. Burton was incarcerated at that time due to his convictions, it was agreed that this matter would be decided upon written submissions of the parties.[1]

---

[1] Mr. Burton informed the examiner by correspondence dated April 19, 1988 that he is "no longer incarcerated, as such," and provided his new mailing address.

The record in this case clearly and convincingly establishes that Mr. Burton has been previously convicted of three felonies. Copies of the Judgments of Conviction are attached hereto. On August 11, 1982 he was convicted of felony theft under Wis. Stats. sec. 943.20(1)(b), and placed upon probation. On September 23, 1985, he was convicted of felony extortion under Wis. Stats. sec. 943.30(1), and was sentenced to not more than 5 years in prison. On November 12, 1985, he was convicted of felony burglary under Wis. Stats. sec. 943.10(1)(a), and sentenced to prison for a term concurrent with that imposed for his felony extortion conviction.[2]

Pursuant to Wis. Stats. sec. 111.335(1)(c),

> ...(I)t is not employment discrimination because of conviction record to refuse to...license...any individual who:
>
> 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular...licensed activity....

Thus, the initial issue to be determined in this case is whether Mr. Burton's felony convictions for theft, extortion and burglary are substantially related to the practice of an apprentice funeral director. If they are, both the above-quoted provision of the Wisconsin Fair Employment Act and sec. 445.095(1)(a) of the board's licensing law authorize the denial of Mr. Burton's application.[3] In determining this issue, the Wisconsin Supreme Court has recently discussed and interpreted the test to be applied as follows:

---

[2] The record in this case is somewhat unclear as to the exact number of criminal convictions against Mr. Burton. This appears to be at least in part due to the manner in which he disclosed his background in this area upon the application of October 1, 1987. (Exhibit 1). In the application, Mr. Burton indicated: "Specifically stated, I was convicted of theft, burglary, and extortion in 1985," and "Also: 1 misdemeanor theft retail 1983 (and) 1985 1 misdemeanor theft by virtue of employment." The judgments of conviction entered into the record of this proceeding clearly establish three separate felony convictions for theft in 1982, extortion in 1985, and burglary in 1985, as set forth in the Findings of Fact. As only these three convictions appear clearly established on the record, this decision does not assume the existence of other convictions. However, to the extent additional convictions of Mr. Burton do exist, it should be noted that they would be merely "cumulative" as foundation for the recommendation herein and, from that standpoint, proof of their existence or nonexistence is unnecessary.

[3] Among Mr. Burton's arguments in this proceeding is that he is applying for an apprenticeship <u>certificate</u>, not a funeral director's <u>license</u>. Since a certificate is not a license, the general argument goes, the statutory exemption from the Fair Employment Act's prohibition against denying <u>licensure</u> does not apply; i.e., although the board can deny licenses based upon conviction records, it cannot deny certificates. However, this argument must be rejected since Wis. Stats. sec. 111.32(10), defines a license for the purpose of the Fair Employment Act as including any certificate, permit, registration, etc., required by the state to practice a profession or occupation. Furthermore, Wis. Stats. sec. 445.095(1)(a), requires the board to consider convictions of applicants in determining their qualification for apprenticeship certification.

"...(S)ociety has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism. {footnote omitted}

"This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the "propensity" to commit similar crimes long recognized by courts, legislatures and social experience.

"...(T)he legislature has clearly chosen to not force ... attempts at rehabilitation in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior.

"...(T)he legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

"We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. It is the circumstances which foster criminal activity that are important, e.g. the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. {footnote omitted}" County of Milwaukee v. LIRC, 139 Wis. 2d 805, 821-825. (1987) Emphasis added.

See also: Law Enforcement Standards Board v. Village of Lyndon Station 101 Wis. 2d 472. 305 N.W. 2d 89 (1981) and Gibson v. Transportation Commission 106 Wis. 2d 22, 315 N.W. 2d 346 (1982).

In determining Mr. Burton's application, the board's Notice of Denial considered the above-cited cases, and stated as follows:

"The position of a funeral director apprentice, and the position of a licensed funeral director to which it leads, is a position of honor and trust. A funeral director must receive and safeguard trust funds, and must deal on a high ethical level with persons who, because of their age or emotional bereavement, are especially vulnerable to unethical

business practices. The crimes applicant was convicted of indicate a lack of ethical regard for the interests of other persons and a disregard of the property rights of other persons. The criminal convictions thus indicate personal qualities which are contradictory to the standards of honor and trust which are required of a funeral director and a funeral director apprentice. The Board therefore, for the protection of the public of this State, denies the application."

The state's attorney in his brief further expands upon the nature of the funeral director profession, and specifically the permitted role of an apprentice, as it relates to the necessity that such individuals be possessed of a high degree of trustworthiness, as follows:

"An apprentice funeral director has significant contact with individuals in a vulnerable state. He or she works essentially as a funeral director, under a licensee's supervision. Supervision of an apprentice is not always at first hand; apprentices perform many duties under general supervision, where the licensed funeral director is not present, but only available on an as-needed basis for consultation and/or intervention. A funeral director apprentice may in the course on his employment be called upon to advise distraught and confused individuals on matters of finance. An apprentice at times may handle significant amounts of money for individuals in the establishment of a burial trust. In the course of his or her duties, an apprentice will likely come into sensitive or confidential information about medical or family histories. There may even be criminal proceedings surrounding a death where the reliability of a funeral director or his or her apprentice must be relied upon.... The need for trustworthiness in an apprentice funeral director cannot be denied."

In reviewing the basis upon which the board denied Mr. Burton's application, and the basis upon which the state argues that that decision should be affirmed, it appears nearly irrefutable that Mr. Burton's felony convictions, both individually and collectively, are substantially related to the practice of an apprentice funeral director. The Wisconsin Supreme Court has said that the issuance of a professional license is an assurance by the state to the public that the individual has the ability to perform professional functions, and that the purpose of licensing is to protect the public. See, Strigenz v. Department of Regulation, 103 Wis 2d. 281, 287-289 (1981). Such a similar assurance regarding the requisite trustworthiness of Mr. Burton cannot be made by this board, given the nature of the felonies for which he has been convicted and the fact that his criminal conduct has been repetitive in nature. Mr. Burton's history of theft, extortion and burglary clearly speak louder, and more convincingly, of his basic regard for the property and personal rights of others, than does his claim of rehabilitation. Mr. Burton's conviction history distinctly establishes his propensity to engage in criminal activity, and given that an apprentice funeral director is in a position to engage in similar types of criminal activity, the public should not be required to assume the risks of repeat conduct.

Mr. Burton, however, argues that he has been held to a different standard than other applicants who have been granted licenses or certificates despite the existence of a criminal conviction record. In this regard, the state provided Exhibit #6, which indicates that the board has granted applications on three separate occasions since 1982 to individuals with prior convictions. However, in each of the three cases only a single conviction was involved, and those predated the applications from approximately 10 to 14 years. In one case, the applicant was pardoned prior to the submission of the application. A denial of Mr. Burton's application would constitute a different outcome from that attained by the three prior applicants, however, it appears that Mr. Burton has been held to the same standard as the other applicants. In this context the Wisconsin Attorney General has advised generally that,

> "...when considering applications of former offenders for licenses...such factors as the nature and number of offenses, the circumstances of the offense, the severity of the offense, the time intervening since the offense and any and all information evidencing rehabilitation of the offender, including job history and reputation in the community should be reviewed." 68 OAG 202, 208 (1979).

In Mr. Burton's case, unlike the other concerned applicants, he has a history of multiple criminal convictions, the most recent of which occurred less than three years ago and for which he has been subsequently incarcerated through at least last month. The nature of the offenses, and their number, establish a pattern of disregard for the rights of others. He can point to no actual evidence of rehabilitation which would serve to repudiate the inference of risk to the public which is strongly created by his past criminal behavior. In my opinion, the board's determination does not reflect an application of a different standard to Mr. Burton's criminal record, but rather a proper finding that Mr. Burton (unlike the other three concerned applicants) does not meet that standard at this time.

Based upon the record in this case, it is recommended the Mr. Burton's application to practice as an apprentice funeral director be denied.

Dated: May 24th, 1988.

Donald R. Rittel
Hearing Examiner

DRR:jkd
BDLS-148

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Division of Corrections
DOC-20 (Rev 3/82)

STATE OF WISCONSIN
Wisconsin Statutes
Section 973.09

JUDGMENT OF CONVICTION
SENTENCE WITHHELD, PROBATION ORDERED

STATE OF WISCONSIN, Plaintiff
v.
Rodd J. Burton Defendant
12/24/63 Defendant Date of Birth

STATE OF WISCONSIN, Circuit Court Branch II
County Ozaukee
Court Case No. 82-CR-462

The defendant entered his/her plea of ☐ guilty ☐ not guilty ☒ no contest;

The ☒ Court ☐ Jury found the defendant guilty of

Crime(s)	Wis. Statute(s) Violated	Felony or Misdemeanor (F or M)	Date(s) Committed
Theft	943.20(1)(b) (3)(b)	F	July 6, 1982

OZAUKEE COUNTY, WISCONSIN
FILED
AUG 16 1982
ELLEN A. MARTIN
CLERK OF COURTS

committed in this County, and

On August 11, 1982, the Court inquired of the defendant why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the Court, and the Court having accorded the district attorney, defense counsel, and the defendant an opportunity to address the Court regarding sentence; and upon all the evidence, records, and proceedings, the Court pronounced findings and judgment as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty,

IT IS DETERMINED that society will not be harmed and the defendant will benefit by being placed on probation pursuant to Sec. 973.09, Wis. Stats.;

IT IS ADJUDGED that sentence is withheld and the defendant is placed on probation for the period of 1 Year, in the custody and control of the Wisconsin Department of Health and Social Services, subject to its rules and orders pursuant to Sec. 973.10, Wis. Stats.

IT IS DETERMINED AND ORDERED that the record requires court-imposed conditions as follows: ☐ None ☐ As ordered below:

That the defendant has the ability to pay within that period the amounts ordered herein. Should his/her financial condition change s/he shall forthwith petition this Court for reconsideration of such conditions.

Fines: ☒ None ☐ $ _____, Court Costs: ☐ None ☐ $ 20.00
Attorney Fees: ☒ None ☐ $ _____; Restitution: ☐ None ☐ $ To be determined
Other: ☒ None ☐ $ _____.

That the defendant shall be incarcerated in the County Jail during non-working hours for the following periods: ☐ None ☐ The period of N/A, and

RECEIVED
NOV 20 1987
Dept. of Regulation & Licensing

IT IS ADJUDGED N/A days sentence credit are due pursuant to Sec. 973.155, Wis. Stats., and shall be credited if probation is revoked.

IT IS ORDERED that the Sheriff deliver the defendant into the custody of the Department as it directs.

(affix seal)

BY ORDER OF THE COURT ~~Secretary of State~~ Deputy or Clerk of Court	
Verna M. Dehne, Deputy	
Name of Judge: Warren A. Grady	Date Signed: August 11, 1982
Name of Defense Attorney: John Kuczmarski	Name of District Attorney: Mark Williams

IMPORTANT-CLERK OF COURT PLEASE NOTE: Send the following to the local Probation and Parole Office – two copies of this Judgment; two copies of the defendant's Probation Questionnaire (Form DOC-38); and one copy of the Criminal Complaint.

DEPARTMENT OF HEALTH & SOCIAL SERVICES
Division of Corrections
DOC-14 (Rev. 8/84)

STATE OF WISCONSIN
Wisconsin Statutes
Section 972.13

JUDGMENT OF CONVICTION
SENTENCE TO WISCONSIN STATE PRISONS

STATE OF WISCONSIN, Plaintiff
v.
Rodd J. BURTON, Defendant

STATE OF WISCONSIN, Circuit Court Branch II
County: Ozaukee
Court Case No. 85-CF-52, 82-CR-462

12-24-63 Defendant Date of Birth

The defendant entered his/her plea of ☐ guilty ☐ not guilty ☒ no contest;

The ☒ Court ☐ Jury found the defendant guilty of:

Crime(s)	Wis. Statute(s) Violated	Felony or Misdemeanor (F or M)	Class (A-E)	Date(s) Crime Committed
Extortion	943.30(1)	F	D	6-28-85

Defendant was sentenced as a result of a probation revocation on September 23, 1985. On case 82-CR-462 defendant was conviction of felony theft on August 11, 1982 and placed on probation.

committed in this County; and

On September 23, 1985, the Court inquired of the defendant why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel, and the defendant an opportunity to address the Court regarding sentence; and upon all the evidence, records and proceedings, the Court pronounced judgment as follows:

IT IS ADJUDGED that the defendant on September 23, 1985 was convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminate term of not more than 5 years on 85-CF-52. Defendant sentenced to 2 years concurrent on 82-CR-462, the probation revocation file.

IT IS DETERMINED AND ORDERED that the record requires court-imposed conditions as follows:

☐ None ☐ As ordered below:

That the defendant has the ability to pay within that period the amounts ordered herein. Should his/her financial condition change s/he shall forthwith petition this Court for reconsideration of such conditions.

Fines: ☒ None ☐ $ ____; Court Costs: ☐ None ☒ $20.00;
Attorney Fees: ☒ None ☐ $ ____; Restitution: ☒ None ☐ $ ____;
Other: ☒ None ☐ $ ____;
Mandatory Victim/Witness Surcharge (Sec. 973.045 Wis. Stats.) ☒ Felony one count (# counts) @ $30.00 Amount $30.00;
☐ Misdemeanor ____ (# counts) @ $20.00 Amount $ ____;
Paid ☐ Yes Amount $ ____; ☒ No

IT IS FURTHER ORDERED that the defendant shall pay surcharges pursuant to Sec. 973.09(1)(b), Wis. Stats.;

IT IS ADJUDGED that -62- days sentence credit are due pursuant to Sec. 973.155, Wis. Stats.;

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the defendant and a copy of this Judgment to the Dodge Correctional Institution (Reception Center) located in the City of Waupun, Wisconsin

RECEIVED
NOV 20 1987

BY ORDER OF THE COURT: Signature of Judge, Deputy or Clerk of Court
Debra A. Schmit

Name of Judge	Date Signed
Warren A. Grady	September 23, 1985
Name of Defense Attorney: John Kuczmarski	Name of District Attorney: Tom Wolfgram

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Division of Corrections
DOC-14 (Rev. 3/82)

STATE OF WISCONSIN
Wisconsin Statutes
Section 972.13

JUDGMENT OF CONVICTION
SENTENCE TO WISCONSIN STATE PRISONS

STATE OF WISCONSIN, Plaintiff

v.

Rodd J. Burton, Defendant

12/24/63, Defendant Date of Birth

STATE OF WISCONSIN, Circuit Court Branch 8

County Dane

Court Case No. 83CF1496

The defendant entered his/~~her~~ plea(s) of ☐ guilty ☐ not guilty ☒ no contest.

The ☒ Court ☐ Jury found the defendant guilty of

Crime(s)	Wis. Statute(s) Violated	Felony or Misdemeanor (F or M)	Date(s) Committed
Burglary.	943.10(1)(a)	F-C	11/21/83

committed in this County, and

On November 12, 1985, the Court inquired of the defendant why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel, and the defendant an opportunity to address the Court regarding sentence, and upon all the evidence, records and proceedings, the Court pronounced Judgment as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminate term of not more than 5 years concurrent with sentence now serving.

IT IS ADJUDGED that ----- days sentence credit are due pursuant to Sec. 973.155, Wis. Stats.

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the defendant and a copy of this Judgment to the Dodge Correctional Institution (Reception Center) located in the City of Waupun

BY ORDER OF THE COURT — Signature of Judge, Deputy or Clerk of Court
Cynthia Fokakis, Clerk of Circuit Court
by: [signature], Deputy Clerk

(affix seal)

Name of Judge	Date Signed
William Sachtjen for S. Steingas	November 12, 1985
Name of Defense Attorney	**Name of District Attorney**
William Bauer	Judy Schwaemle

EX. #1