

Wisconsin Justice Initiative: State's "cocaine mom law" struck down by federal judge

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The state's cocaine mom law is unconstitutionally vague and is unenforceable in the state, a federal court judge has ruled.

The law allowed pregnant women to be locked up if they use drugs or alcohol.

The law "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement. The court will enjoin enforcement of the Act statewide," U.S. District Judge James D. Peterson wrote in his opinion, released Friday.

Tamara Loertscher used drugs before she knew she was pregnant and admitted that fact to doctors. She declined inpatient drug treatment because she no longer was using the drugs, which she had taken in an effort to medicate herself for depression brought on by thyroid problems.

Taylor County officials detained her for several days in the hospital, and she later was incarcerated for contempt of juvenile court for 18 days, until she signed a consent decree that required her to submit to drug monitoring, Loertscher was not provided prenatal care during the 18 days she was jailed.

Loertscher also was thrown into solitary confinement for refusing to take a urine

test to confirm her already established pregnancy.

Loertscher finally was provided a public defender and signed a consent decree agreeing to, among other things, submit to drug testing at her own expense. All the tests were negative.

Peterson, in his decision, said there is conflicting evidence about how much drug or alcohol intake by an expectant mother poses a substantial risk to the child and how effective state-mandated treatment programs are.

Attorney General Brad Schimel's office, defending the law, argued that the court should be more lenient with its consideration of the statute's vagueness because it is a civil statute, not a criminal one.

Peterson shot that down. "This is too simplistic a view," he wrote. "Although the Act is nominally a civil statute and does not impose a criminal liability, its consequences are nearly equivalent to criminal sanctions: a woman subject to the Act may be involuntarily detained for treatment, as Loertscher's own case shows."

The statute involves constitutional rights to be free from physical restraint and the right to be free from coerced medical treatment, Peterson said.

The law contains a two-prong test to help determine whether a mother is in violation: the mother must "severely and habitually lack self-control in the use of alcohol, controlled substances, or controlled substance analogs" and that lack of self control must "pose a substantial risk that the physical health of the child will be seriously affected or endangered."

"Presumably, these terms are intended to prevent enforcement of the Act against minimal users of alcohol or controlled substances," Peterson wrote. "But where to draw the line? The State contends that its experts and social workers in the field can draw the line. But their answers are just as circular and standardless as the dictionary definitions."

The word "habitually" poses a similar problem, Peterson wrote. "Habitually means in some sense 'recurrent,' so it, too, poses a quantitative question: how often is often enough to be 'habitual'?" he said.

"How would the Act deal with an expectant mother who does not believe that alcohol—or some other drug—is really dangerous to the unborn child, and on the

basis of that belief, consciously chooses to drink or use drugs during her pregnancy? There would be no demonstrated lack of self-control in such a case. So under the terms of the Act, a defiant—as opposed to dependent—expectant mother would not be subject to State control. ... The point is that the conduct covered by the Act is fundamentally unclear,” he wrote.