STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Appellate Case No. 2015AP000959-CR

STATE OF WISCONSIN

PLAINTIFF-RESPONDENT,

v.

JACK M. SURIANO,

DEFENDANT-APPELLANT.

On Notice of Appeal from a Judgment of Conviction
Entered in the Door County Circuit Court,
The Honorable D. Todd Ehlers Presiding.

# BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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## QUESTIONS PRESENTED

I. Did the Defendant forfeit his right to counsel?

>>The trial court answered "Yes."

II. Was the defendant competent to represent himself at trial?

>>The circuit court implicitly found "Yes."

## POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

The State requests neither oral argument nor publication. This case involves only the application of established legal principles to the facts presented.

## STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State offers supplementary facts and procedural history, beyond that presented by the defendant in his brief.

At the trial court level the defendant had four, not three, attorneys provided to him (73:31-22; R-Ap.101).

At the January 09, 2014 Motion Hearing at which Attorney Grant Erickson withdrew from representing the defendant (70: R-Ap.102.), the court made clear to the defendant that the case would be moving forward and that the defendant must be ready with new counsel to proceed on the dates set:

> "well, I'll just reiterate, Mr. Suriano, just so you understand, and I'm sure Mr. Erickson brought it to your

> attention, we have a Pre-Trial Conference set in the matter February 17 and a Trial set for March 4. So Ms. Schaefer has apparently been appointed by the Public Defender's Office. I'm sure you and she are going to be making arrangements to get together and meet, but as of right now those dates remain on the calendar until I hear a request to change them and I'm not anticipating that I am going to hear that from Ms. Schaefer or that I'm not going to hear that from Ms. Schaefer. I don't know, but I appreciate she's just gotten involved in the case and we're talking about a Pre-Trial that's just about a month from now and a Trial that's a month and a half from now, but we'll go from there." (70:9 R-Ap.111).

At the May 14, 2014 Motion Hearing, at which Attorney Raj Singh, the defendant's fourth attorney, moved to withdraw, the defendant was alerted clearly the prospect that this action may result in a finding the defendant had forfeited his right to counsel. The prosecutor alerted the defendant when he represented to the court:

> "just in event you grant the Motion, your Honor, I believe an ample basis both because of the number of attorneys and the reasons on the record given by two out of the four attorneys that have represented Mr. Suriano represent Mr. Suriano's behavior that if you grant the Motion to Withdraw I think you should also find the defendant has forfeited his right to public representation and that he either goes alone or goes out and hires his own lawyer" (73:21-22 R-Ap.115-117).

In his comments about the various attorneys who had represented him up to that point the defendant made clear his belief that no attorney's representation on any aspect of the case should differ with the defendant's own feelings. As to Attorney Grant Erickson (attorney #2) the defendant stated: "well, I'm entitled to opinions and so is he, so this shouldn't prejudice me" (73:24 R-Ap.118). As to Attorney Linda Schaefer and her withdrawal (attorney #3) the defendant described his disagreement with the way she was representing him, including his legal opinion as to the way she was proceeding, then concluded with "that shouldn't prejudice me that they don't want to proceed the way I want to proceed" *Id*. As to the attorney withdrawing on May 14, 2014, Raj Singh (attorney #4), the defendant characterized his relationship with that attorney as "and this guy's been combative to me since the first day. Refusing to correspond with me and he's doing

nothing for me. He has gone specifically against my wishes." (73:24-25 R-Ap. 118-119).

Immediately following the prosecutor's alerting of the Court and the defendant to the prospect that the defendant had forfeited his right to counsel by his actions, and the defendant's explanations, from his perspective, as to why all four attorneys had gone by the wayside, the court engaged in a detailed colloquy with the defendant as to his education, experience, and competence:

> THE COURT: Remind me again, Mr. Suriano, you are a high school graduate, correct?
>
> THE DEFENDANT: Sure
>
> THE COURT: Do you have some college education?
>
> THE DEFENDANT: Sure.
>
> THE COURT: Do you have a college degree?
>
> THE DEFENDANT: Sure.
>
> THE COURT: In what?
>
> THE DEFENDANT: I have a couple of college degrees.
>
> THE COURT: Well, tell me what both of them are.
>
> THE DEFENDANT: Geology and Chemistry.
>
> THE COURT: All right. So you have two undergraduate degrees. Do you have any education beyond that?
>
> THE DEFENDANT: Grad School.
>
> THE COURT: Okay, what did you study in graduate school?
>
> THE DEFENDANT: I believe it was called environmental science conservation or resource recovery.
>
> THE COURT: and did you get a degree? A Graduate Degree?
>
> THE DEFENDANT: No. Actually, I chose to get a job instead of defending my thesis. One credit.
>
> THE COURT: You've been a self-employed person for some period of time running your own businesses?

THE DEFENDANT: A lot my—my career was self-employed.

THE COURT: Anything else you want to tell me, sir?

(73:25-27 R-Ap.120.). Immediately after this colloquy the court ruled: "you forfeited, as far as I'm concerned, your right to have legal representation." The court then went on to make clear to the defendant:

> "when I'm saying you forfeited your right to have an attorney, that doesn't mean you can't get an attorney, but I'm finding (sic) your actions have made it clear that you will not cooperate with any attorney." (73:27 R-Ap.121.).

In justifying this decision the court made a number of findings. As to attorney Erickson (attorney #2) the court stated

> "and in my 32 years of experience, I've never heard another attorney, or now as a judge for the last 14 years has an attorney in my court referred to his client as an ass, but Mr. Erickson on the record called you an ass so clearly you couldn't work with him" (73: 28 R-Ap.122.).

As to attorneys #3 and #4, Schaefer and Singh, the court found:

> "but clearly there is a problem with your relationship with any attorney, sir, and this is just – we had a trial date in this case set in March when Ms. Schaefer withdrew. That Trial date had to get rescheduled…..But this is a game. Yes. It's a game, Mr. Suriano, and I'm done playing it. This case is moving forward. It's going to be tried on June 4" (73: 28-29 R. Ap.123).

A Motion Hearing occurred on May 27, 2014 at which the defendant represented himself (74: R-Ap.124). At that Motion Hearing witnesses were called and testimony taken. The defendant cross-examined multiple witnesses and made arguments on his own behalf.

Between May 14 and the Trial date of June 4, 2014, the defendant filed, on his own, a number of motions. These included a Defense Motion to Reconsider Denial of a Suppression Motion (33), a Motion to Reconsider a Denial of his Petition for Appointment of Counsel (34), a Motion for Interlocutory Appeal (35), a Motion for

Additional Discovery (36), and a new Motion to Suppress Evidence (37). These motions were all heard on June 2, 2014 (75: R-Ap.134-137). On June 2 the defendant filed additional motions, on his own. These included a Motion to Stay Proceedings (41), as well as a Motion to Suppress Due to a Defective Warrant (42).

At the June 2 Motion Hearing, the matter of the defendant having forfeited his right to counsel was again raised. At the start of the hearing, the defendant urged the court to appoint a 5th attorney for him at public expense. In denying this request the court stated:

> "….That's why I made it very clear on the record the day you were in court with your last Public Defender Counsel, Mr. Singh, and I think I had talked about this even when Ms. Schaefer was getting off the case that you are starting to get dangerously close to a situation where you are not going to be eligible any longer for Public Defender representation and that is exactly the circumstance that arose". (75: 5 R. Ap.136-137).

The court went on and stated:

> "so there is specific Wisconsin law and case law that talks about when because of a defendant's actions they have gotten themselves to the point of they have forfeited their right to have counsel or at least counsel appointed by the court. I'm just finding again and reiterate today that you forfeited your right for court appointed counsel." (75: 6R-Ap.137)

The Trial took place on June 4, 2014 (76 R-Ap.13-140). During that trial the defendant conducted his own Voir Dire of the prospective jurors (76: 61), provided an opening statement (76: 102), and examined multiple witnesses. He also presented his own testimony of events (76: 299). He then participated in a jury instructions conference (76: 323-325).

## STANDARD OF REVIEW

The right to counsel is guaranteed by both Article 1 Sec. 7 of the Wisconsin Constitution as well as the Sixth Amendment to the United States Constitution. *State v. Cummings*, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996). However, a defendant also has a right to be his own advocate. *State v. Marquardt*, 2005 WI 157 ¶56, 286 Wis.2d 204, 705 N.W.2d 878. Whether a defendant was deprived of his constitutional right to counsel is a question of

constitutional fact, which the Court of Appeals reviews de novo. *State v. Coleman*, 2002 WI App 100, ¶10, 253 Wis.2d 693, 644 N.W.2d 283.

Although a defendant has a constitutional right to counsel, that defendant "may, by his or her conduct, forfeit the right to counsel." *Coleman*, 2002 WI App 100, ¶ 16. This most often occurs in cases, like this one, of manipulative or disruptive defendants, where the defendant "obstruct[s]" the orderly procedure of the courts." Or hinders the administration of justice. *Id*.; *State v. Woods*, 144 Wis.2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). Forfeiture of the right to counsel occurs "not by virtue of a defendant's express verbal consent to such procedure, but rather by operation of law because the defendant has deemed by his own actions that the case proceed accordingly." *Woods*, 144 Wis.2d at 715-16.

## ARGUMENT

### I. THE DEFENDANT FORFEITED HIS RIGHT TO COUNSEL.

In Wisconsin, a defendant, may by his or her conduct, forfeit the right to counsel. *Cummings*, 199 Wis.2d 756. Although not mandatory, trial courts have been provided a number of suggested steps to take before determining a defendant has forfeited the right to counsel. *Cummings*, 199 Wis.2d 721, 756 note 18, 764, 546 N.W.2d 406 (1996).

The suggested procedures include:

1. Warn the defendant that if he continues with the behavior he has been displaying the court will deem the right to counsel forfeited and require him to proceed without counsel;
2. Make the defendant aware of the difficulties and dangers inherent in self-representation;
3. Provide a clear ruling when the court deems the right to counsel to have been forfeited;
4. Make factual findings to support the court's ruling *Id*.

In this case the defendant was clearly put on notice as early as January 9, 2014 that he risked losing his right to counsel if he continued with the behavior he had been displaying towards attorney Grant Erickson (attorney #2). This was the attorney who characterized the defendant's objectives in the case "to be an ass" as well as having a "desire to make it difficult or frustrating for the court system to proceed." (75; 5-6 R-Ap.108).

The court again warned the defendant, on February 17, 2014, that if he continued with the behavior he had been employing with his attorneys up until that point, he risked giving up his right to counsel. When Attorney Linda Schaefer moved to withdraw that day (attorney #3), the court specifically told the defendant "you will now be on your third attorney (sic) appointed with the Public Defender's Office. I think they have a three-strike rule. Talk to them about that." (71: 6).

The issue again arose on April 7, 2014 (72:10-11).

When Attorney Singh was allowed to withdraw on May 14, 2014 (attorney #4), the court engaged in a lengthy colloquy with the defendant described above. Only after exploring with the defendant his education and experience did the court make the determination the defendant had in fact forfeited his right to counsel. Even at that point in time however, the court made clear to the defendant that he was free to seek out counsel on his own and even left open the possibility of a further court-appointment of counsel if the defendant did certain things (76: 30-31).

The record is clear in this case that, over the course of many months, the defendant displayed an intention and plan to manipulate and disrupt the proceedings. He did this in both his behavior towards the various appointed attorneys as well as in his conduct in court on the issue of the continuation of those attorneys. Although the defendant consistently refused to say he wanted to proceed on his own, his conduct made clear to the court that he would not cooperate with any attorney appointed for him. Such conduct by a defendant is the very reason why our Supreme Court established the concept of forfeiture of the right to counsel in *State v. Coleman*. In the hearings on January 9, February 17, May 27, and June 2, 2014, the court made clear that the defendant was heading towards forfeiting his right to counsel and the reasons why. This court should affirm that finding by the trial court.

## II. THE DEFENDAT WAS COMPETENT TO PROCEED PRO SE.

Even in situations where, as here, a defendant has been found to forfeit his right to counsel, a court must still determine whether or not the defendant is competent to proceed without an attorney:, *State v. Coleman* 253 Wis. 2d 693,¶32-35, 684 N.W. 2d 283. In addition, a reviewing court must be able to find a determination of a defendant's competency to proceed in the record. *State v Klessig* 211 Wis. 2d 194, at 212, 564 N.W. 2d 716 (1997). Even if the trial court fails to make a specific competency determination on the record, this court should not reverse where the record demonstrates that the defendant was competent to proceed pro se. *Id* at 214-14, 564 N.W. 2d 716.

Even if competency cannot be found from the trial court record, this court should remand to the circuit court for such a competency determination. (*Id* at 213, 564 NW 2nd 716). It is clear from the record that the defendant was competent to proceed. As laid out in the supplemental statement of facts above, the trial court engaged in an extensive colloquy with the defendant as to his education and experience at the May 14, 2014 hearing. The court did this before determining that the defendant had forfeited his right to counsel. Even after that hearing the defendant further demonstrated his competency to proceed by preparing, filing, and arguing, multiple sophisticated motions. These included Motions to Suppress, Motions to Reconsider Earlier Orders of the Court, Motions for Stay Pending Appeal, and for Discovery. Further, the defendant argued these motions extensively, on his own, at a hearing on May 27, 2014, and again at another hearing on June 2, 2014. Finally, the transcript of the trial in this case makes clear that the defendant was able to capably present the defense he believed should result in his acquittal. Throughout, the defendant has shown an ability and willingness to object and speak-out in court proceedings. He has demonstrated that he is of at least average intelligence, he is literate, and he is comfortable with speaking in court. He has demonstrated no physical or mental disability that would lead to a finding of incompetence to represent himself. In fact, the defendant does not assert any such disability in this appeal. For these reasons this court should conclude that the totality of the record demonstrates the defendant's competence to proceed without an attorney.

## CONCLUSION

For the reasons stated herein, the State respectfully urges that this court affirm the Judgement of Conviction and sentence in this case(61; 3 R-Ap.140.).

Dated this ____day of August, 2015.

Respectfully submitted,

_____

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of 809.19(8)(b) and (c) in that it is; proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 3,279 words.

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of August, 2015.

_____
Raymond L. Pelrine
District Attorney

# APPENDIX

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