STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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 Todd D. Ehlers Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Circuit Court Violated Mr. Suriano's Constitutional Rights by Ruling that he Forfeited his Right to Counsel.

The State notes that Mr. Suriano "had four, not three, attorneys provided to him." (State's response at 1). This is untrue. Attorney Eric Maciolek appeared with Mr. Suriano at the very first appearance, but was not appointed to the case due to his unavailability. The circuit court did not count this attorney against Mr. Suriano, instead stating that, "Mr. Maciolek, yes, I agree. If I recall, we're going back to last fall, but right. Mr. Maciolek apparently didn't take the case because he was busy - - too busy with some other matters." (App. 142). The State's implication that this attorney should count against Mr. Suriano is misleading. (*also see* p. 2 characterizing Attorney Erickson as "attorney #2,"Attorney Schaefer as "attorney #3," and Attorney Singh as "attorney #4).

The State also mischaracterizes the record when asserting that the court repeatedly warned Mr. Suriano that he was heading toward forfeiture. The State first points to January 9, 2012, when Mr. Suriano's first appointed attorney, Grant Erickson, withdrew. The State claims that, "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." (State's response at 2). To the contrary, as the quote reproduced by the State clearly shows, the court said "*as of right now* those dates remain on the calendar" and "we'll go from there." (*Id.*, emphasis added).

The State also erroneously claims that, "[i]n 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." (State's response at 7). The court's ruling on forfeiture took place on May 14, 2014. (73:27-29; App. 141-143). By May 27th and June 2nd, forfeiture was a foregone conclusion.

Moreover, the State unconvincingly argues that, on May 14, 2014, the "defendant was alerted clearly [sic] the *prospect* that this action may result" in forfeiture. (State's response at 2, emphasis added). May 14th was the very day that the court ruled on forfeiture. At that point, forfeiture was not a "prospect" that Mr. Suriano could take action to prevent. Moreover, the State moved for forfeiture orally and did not file a written motion prior to May 14th. Thus, Mr. Suriano did not have prior notice. Mr. Suriano asked for an adjournment so he could prepare a response to the State's motion, but the court denied his request.

Finally, the State's assertion that the circuit court went through an "extensive" or "lengthy" "colloquy" with Mr. Suriano before ruling on forfeiture is a mischaracterization. (State's response at 7, 8). In ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996) the Wisconsin Supreme Court instructed circuit courts to engage in a "colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation." ***Id.*** at 764. In the instant case, all the court did was question Mr. Suriano about his educational and employment experience. (73:25; App. 140). The court did not even touch upon the difficulties and dangers of self-representation.

The circuit court never warned Mr. Suriano that forfeiture of his right to counsel was a possibility. Nor did the court warn Mr. Suriano of the difficulties and dangers in self-representation. The issue of forfeiture was first raised on May 14, 2014—the very day that the State made its oral motion and the court made its oral ruling (without allowing Mr. Suriano time to prepare a response).

The circumstances of this case did not warrant the drastic remedy of forfeiture of counsel, and Mr. Suriano is entitled to a new trial with representation of counsel.

The State goes over the various motions Mr. Suriano filed pro se, seemingly to imply that he was not prejudiced by the deprivation of counsel. (State's response at 4-5). This position is untenable. The denial of counsel is structural error, and cannot be dismissed as "harmless." ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491 ("the deprivation of counsel during critical stages in criminal proceedings has long been considered structural error, for which automatic reversal is required.").

II. The Circuit Court Violated Mr. Suriano's Constitutional Right to Counsel by Refusing to Provide Reasonable Time for Mr. Suriano to Obtain an Attorney.

The State's response brief does not address Mr. Suriano's argument that the court erred by refusing to grant an adjournment to allow him to secure counsel for trial. "When a respondent does not refute an appellant's argument, we may assume it is conceded." ***State v. Peterson***, 222 Wis. 2d 449, 588 N.W.2d 84.

Instead, the State's argument is that Mr. Suriano was competent to represent himself. The State explains, "a

defendant also has a right to be his own advocate." (State's response at 5 (case citation omitted)). This is beside the point. Mr. Suriano never asked to represent himself. The court forced him to proceed pro se by refusing his eminently reasonable request for an adjournment of the trial date.

Notably, there was only one adjournment of the trial date in this case. The trial was originally set for March 4, 2014. On February 3, 2014, Attorney Schaefer asked for an adjournment. (18). On February 17, 2014, the court removed the trial date. After a status conference held on April 7, 2014, the court set a new trial date for June 4, 2014. The trial took place on that date. (76). This is not a case in which the trial had been rescheduled numerous times.

Even after the court ruled that Mr. Suriano had forfeited his right to public representation, Mr. Suriano took the initiative to find an attorney on his own who would accept the case. The only hook was that the new attorney, Eric Wimburger, needed time to prepare for trial. The court refused to grant an adjournment, instead insisting that the trial remain on the calendar for July 4, 2014. This allowed Mr. Suriano a mere five business days to find an attorney who was willing and able to be prepared to represent him at trial. Unsurprisingly, he was unable to do so.

The circuit court's denial of Mr. Suriano's request for an adjournment was unreasonable and deprived him of his constitutional right to counsel. Mr. Suriano is entitled to a new trial.

CONCLUSION

For the reasons stated above and in Mr. Suriano's brief-in-chief, Mr. Suriano respectfully asks this Court to vacate the judgment of conviction and remand the case for a new trial.

Dated this 15th day of September, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 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 and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,106 words.

CERTIFICATE OF COMPLIANCE WITH 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 15th day of September, 2015.

Signed:

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