STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK M. SURIANO,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ARGUMENT

The Trial Court Erred by Ruling that Mr. Suriano Forfeited his Constitutional Right to Counsel.

A. Even under existing Wisconsin law Mr. Suriano should prevail because the record does not support a forfeiture ruling.

Forfeiture of counsel in Wisconsin is a "drastic" step that is reserved for "extreme" circumstances only. ***State v. Coleman***, 2002 WI App 100, ¶¶24-25, 253 Wis. 2d 693, 644 N.W.2d 283. In attempting to prove that the circumstances of this case were "extreme" (State's brief at 14), the State distorts several key facts and asserts that ***Coleman*** was wrongly decided.

1. The circumstances in this case were not "extreme."

The State argues that "Attorney Erickson was actually Suriano's second attorney. On November 25, 2014, Assistant State Public Defender Eric Maciolek appeared for Suriano at a hearing . . ." (State's brief at 4, n.1). The brief hearing held on November 25, 2014, consisted of a discussion about Mr. Suriano's request for judicial substitution. (65:2). The State notes that the record does not contain an order of withdrawal. (State's brief at 4, n.1). This is because Attorney Maciolek was not appointed to represent Mr. Suriano. An attorney who appears at a single hearing with a defendant is not automatically appointed. The first order appointing counsel (Attorney Grant Erickson) was not entered until

December 4, 2013.[1] (App. 101). The circuit court and court of appeals both agreed that there was no support for the State's claim that Attorney Maciolek was appointed as Mr. Suriano's first attorney. (App. 152, n.2).

In addition, the State repeatedly argues that Mr. Suriano delayed the trial three months. (State's brief at 2, 12, 23, 27, 28). To the contrary, the State cannot prove that Mr. Suriano was responsible for any postponement of the trial date. On December 31, 2013, the court sent out a notice of jury trial for March 4, 2014. (Wisconsin Circuit Court Access (WCCA)). Subsequently, the court granted Attorney Erickson's motion to withdraw and Attorney Schaefer was appointed. Before Attorney Schaefer moved to withdraw, she filed a motion to adjourn the March 4, 2014, trial date due to a conflict in her calendar. (18). Therefore, even if Attorney Schaefer had *not* withdrawn, the trial date would have likely been adjourned anyway. Subsequently, on April 7, 2014, the court sent out a new notice of jury trial for June 4, 2014. There were no further adjournments.

When the first trial date was removed from the calendar, the court indicated that it would set a new trial date approximately 60 days out. (71:7). In response, Mr. Suriano asked the court about the suppression motion that Attorney Erickson filed, and requested a hearing on it "in a short time line." (71:7). The court told Mr. Suriano to wait until a new attorney was appointed. (71:8).

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[1] The State asserts that "the circuit court appointed Attorney Grant Erickson of the State Public Defender's Office to represent Suriano." (State's brief at 4). The circuit court did not appoint Attorney Erickson, or any other attorney. The State Public Defender (SPD) was the appointing body. Moreover, all three attorneys were private bar attorneys who accepted SPD appointments. *See* Wis. Stat. § 977.08(2) and (3)(a)-(g).

In addition, the State mischaracterizes the circuit court's rulings. The State asserts that "[t]he circuit court ultimately concluded that Suriano's abuse of his counsel was so extreme that he forfeited his right to counsel." (State's brief at 2). The State provides no citation to the record for these assertions.

The court did not find that Mr. Suriano "abused" his counsel, nor did it characterize the circumstances as "extreme." Instead, the court found that Mr. Suriano "[would] not cooperate with any attorney" and that he was playing a "game." (73:27, 29, App. 128, 130). The difference between not cooperating with counsel and abusing counsel is not inconsequential. Moreover, the court did not entirely fault Mr. Suriano for his attorneys' withdrawals, telling Mr. Suriano, "I'm not placing 100 percent of the blame on you. . . ". (75:5; App. 146).

Criminal defendants are entitled to disagree with counsel. Indeed, there are several key decisions that are the defendant's right to decide, *regardless* of counsel's wishes. One of Attorney Erickson's objectives for the case was to "resolve the matter short of trial." (70:5). This suggests that Attorney Erickson wished for Mr. Suriano to plead no contest or guilty to the charge. But this was Mr. Suriano's decision to make. ***Jones v. Barnes***, 463 U.S. 745, 751 (1983).

The State characterizes Mr. Suriano's insistence on a hearing on his suppression motion as "start[ing]. . . [an] argument with the court." (State's brief at 6-7). Attorney Erickson filed a suppression motion before he moved to withdraw. (14). Subsequently, Mr. Suriano asked the court about the motion. The court told him it would not schedule a hearing yet, but assured him, "absolutely. We're going to schedule it on." (70:11). Given the court's assurance,

it was not unreasonable for Mr. Suriano to continue to ask about the suppression motion.

The State accuses Mr. Suriano of compromising his attorneys' ethical obligations by urging them to file motions that the State alleges were without merit. (State's brief at 24). No attorney is required to file a frivolous motion at a client's request. Mr. Suriano's attorneys could and *did* simply refuse.

In sum, the "extreme" misconduct the State alleges consisted of, at most, impassioned disagreement with counsel. Attorney Singh claimed to be wary of Mr. Suriano's hostility, but he did not allege that Mr. Suriano harmed or threatened him. Defense attorneys do not need protection from their headstrong clients' rude behavior. Working through difficult attorney-client relationships is part of the job. *See* ***Tennessee v. Carruthers***, 35 S.W.3d 516, 538 (Tenn. 2000) (If counsel was "merely" receiving letters calling him incompetent, instead of threatening him, he would not move to withdraw because "we all get those time to time. . .").

The State emphasizes that the court told Mr. Suriano he could hire an attorney, and criticizes him for failing to do so. (State's brief at 13). Mr. Suriano qualified for an SPD appointment in a criminal case; therefore, he was by definition indigent. *See* Wis. Stat. § 977.02(3). He was entitled to an appointed attorney, whether the appointment was through the SPD[2] or the court.

In sum, the State has failed to prove that the circumstances of this case were "extreme."

[2] Mr. Suriano was unable to find statutory support for the purported "three strike rule" that the court attributed to the SPD.

2. ***Coleman*** was not wrongly decided.

The State claims that court of appeals wrongly decided ***Coleman***, 253 Wis. 2d 693, by adding a new requirement to the forfeiture doctrine set forth in ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996). (State's brief at 13, 26-27). According to the State, the only requirement for forfeiture of counsel under ***Cummings*** is that the defendant acted voluntarily, "regardless of whether the defendant *intended* to cause delay." (***Id.*** at 26). Yet ***Coleman*** held that, "the defendant must also have the purpose of causing that effect." ***Coleman***, 253 Wis. 2d 693, ¶18.

The State does not fairly present ***Cummings***'s holding. ***Cummings*** endorsed the court of appeals' holding from ***State v. Woods***, 144 Wis. 2d 710, 424 N.W.2d 730 (Ct. App. 1988) that "unusual circumstances . . . permit a court to find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law." ***Cummings***, 199 Wis. 2d at 752 (quoting ***Woods***, 144 Wis. 2d at 715-16). This Court's use of the term "deliberate," as well as the implication that the defendant "chose" to proceed pro se indicate that the Court was, in fact, concerned with the defendant's subjective intent.

Coleman also relied on this Court's decision ***State v. Keller***, 75 Wis. 2d 502, 249 N.W.2d 773 (1977), in which this Court reversed the circuit court's ruling that a defendant lost his right to counsel when his retained counsel did not appear for trial because "the record before us contains no evidence that the change of counsel was made for the *purpose* of delay or to manipulate the right to counsel so as to obstruct the orderly procedure for trials. . . ". ***Id.*** at 506 (emphasis added).

Coleman is consistent with this Court's holdings.

B. This Court should implement a mandatory in-court procedure for trial courts to follow prior to ruling that a defendant has lost the right to counsel through disruptive behavior.

In arguing against Mr. Suriano's proposed procedure, the State ignores relevant cases from the United States Supreme Court and cites to cases from other jurisdictions that support, rather than undermine, Mr. Suriano's position.

1. The State ignores and misinterprets the United States Supreme Court's relevant holdings.

The State argues that Mr. Suriano's proposed procedure is not constitutionally required. (State's brief at 29). The fact that the United States Supreme Court has not yet addressed the specific topic of forfeiture of the right to counsel does not mean that prior warning is not constitutionally required.[3] From the Court's other holdings, certain core principles emerge. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." ***United States v. Cronic***, 466 U.S. 648, 654 (1984) (internal citation omitted).

Given the vital importance of the right to counsel, trial courts bear a "serious and weighty" protecting role over the defendant and must "indulge every reasonable presumption

[3] Indeed, in ***Smith v. Grams***, 565 F.3d 1037, 1047 (7th Cir. 2009), the seventh circuit reversed the Wisconsin court of appeals after the defendant was forced to proceed pro se where the trial court never warned him because "even the Supreme Court's minimal guidance makes it clear that the procedures followed by the Wisconsin state trial court were inadequate. . .".

against waiver of fundamental constitutional rights." ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938) (internal citation omitted).

The right to counsel is so important that even where a defendant *voluntarily* requests to represent himself the defendant must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" ***Faretta v. California***, 422 U.S. 806, 835 (1975) (internal citation omitted).

When faced with the prospect of an *involuntary* loss of the right to counsel, it follows that the Court would be just as concerned, if not more so, about the defendant's awareness of the risk of losing the right to counsel and knowledge of the dangers and disadvantages of self-representation. The State ignores both ***Johnson*** and ***Faretta***.

In an analogous context, the Supreme Court requires prior warning before a defendant may be held to have forfeited a fundamental constitutional right. ***Illinois v. Allen***, 397 U.S. 337 (1970). The State quotes ***Allen***'s statement that trial courts "must be given sufficient discretion to meet the circumstances of each case" and there is "[n]o one formula for maintaining the appropriate courtroom atmosphere . . .". (State's brief at 30; ***Allen***, 397 U.S. at 343-44).

The State interprets this statement to mean that trial courts are not always required to warn defendants prior to removing them from the courtroom. Mr. Suriano disagrees. In context, this quote refers to a trial court's discretion to choose among various options for managing an unruly defendant, including binding and gagging the defendant, citing the defendant for contempt, or removing the defendant from the courtroom. ***Id.*** at 343-44. However, if the court chooses the

option of removing the defendant from the courtroom, a prior warning is required. ***Allen***, 397 U.S. at 343; *see also* ***State v. Vaughn***, 2012 WI App 129, ¶21, 344 Wis. 2d 764, 823 N.W.2d 543; Wayne R. LaFave, 6 Crim. Proc. § 24.2(c) (4th ed. 2015) (requirement of prior warning was "essential" to ***Allen***'s holding).

2. The cases the State cites from other jurisdictions do not undermine Mr. Suriano's claim.

The cases that the State cites pertaining to forfeiture of counsel in other jurisdictions generally acknowledge a doctrinal difference between traditional waiver, waiver by conduct and forfeiture. *See* ***United States v. Goldberg***, 67 F.3d 1092, 1099-1102 (3d Cir. 1995). *Only* in the case of forfeiture, which involve extreme misconduct, is a lack of prior warning and advisement excused. The cases cited upholding forfeiture findings fit into two general categories: (1) assault/threats to counsel, and (2) financial ability to hire counsel combined with repeated failure to do so.

a. Assaults/threats to counsel.

Several jurisdictions agree that trial courts may find that a defendant forfeited the right to counsel with no prior warning when a defendant physically assaults counsel or makes credible threats of harm against counsel.

In ***Carruthers***, 35 S.W.3d 516, 550, the Tennessee Supreme Court held that the trial court properly determined that the defendant forfeited the right to counsel after the defendant made "outrageous" and credible threats against counsel. The defendant was on trial for homicide and had committed violent assaults in the past. ***Id.*** at 540, 542.

Likewise, in ***Gilchrist v. O'Keefe***, 260 F.3d 87 (2nd Cir. 2001), the defendant was found to have forfeited the right to counsel after punching his appointed trial counsel in the head, causing a ruptured eardrum. The second circuit noted that if the case was on direct review, it may have reversed given that the violence was "a single incident" and the defendant was never warned. ***Id.*** at 89. However, the case was on deferential habeas review. ***Id.*** at 90.[4]

In ***Maine v. Nisbit***, 134 A.3d 840, 852 (Maine 2016), the Maine Supreme Court held that the defendant both forfeited the right to counsel and waived the right to counsel by conduct. The basis for the forfeiture ruling was the defendant's "direct and graphic threat of future physical harm" toward counsel. ***Id.*** at 855.

Here, however, Mr. Suriano did not assault or threaten counsel.

b. Financial ability to hire counsel and repeated failure to do so.

Many jurisdictions also agree that where a defendant can afford to hire counsel but repeatedly fails to do so, a trial court may find that a defendant forfeited the right to counsel through "extremely dilatory conduct."

In ***State v. Jones***, 772 N.W.2d 496, 506 (Minn. 2009), a non-indigent defendant repeatedly failed to hire counsel,

[4] The ***Gilchrist*** court acknowledged that the United States Supreme Court has not rendered a decision precisely on point, but cautioned that, "the lack of Supreme Court precedent specifically addressing forfeiture of the right to counsel does not mean that any determination that such a fundamental right has been forfeited, even if based on an utterly trivial ground, would survive habeas review." ***Id.*** at 97.

causing three continuances. The ***Jones*** court held that the defendant's conduct was "extremely dilatory" because he was able to afford an attorney, but appeared on eight occasions without counsel. ***Id.***

In ***Com. v. Lucarelli***, 971 A.2d 1173, 1180 (Penn. 2009), the Pennsylvania Supreme Court held that the defendant forfeited the right to counsel by engaging in "extremely dilatory conduct" where the defendant had the opportunity and financial ability to hire an attorney but repeatedly failed to do so. *See also*, ***Siniard v. Alabama***, 491 So. 2d 1062, 1064 (Ala. Crim. App. 1986) (defendant had the ability to hire counsel, but repeatedly failed to do so).

Here, however, Mr. Suriano was indigent. He could not afford to hire an attorney.

Thus, the cases cited by the State acknowledge that in extreme circumstances (cases of violence or threats toward counsel or ability to hire counsel and repeated failure to do so), a defendant may be held to have forfeited the right to counsel with no prior warning.

However, none of the cases supports the State's argument that a defendant may forfeit the right to counsel by disagreeing with or acting rudely toward counsel when the court has not warned the defendant of the possibility of losing the right to counsel or advised the defendant of the dangers and disadvantages of self-representation. *See e.g.*, ***Utah v. Pedockie***, 137 P.3d 716, 722 (Utah 2006) (defendant alternated between "firing" his appointed counsel, retaining counsel, and arguing with counsel; yet the court held that "we find no basis for imposing forfeiture under the facts presented here."); ***Fischetti v. Johnson***, 384 F.3d 140, 146-47 (3rd Cir. 2004).

In sum, none of the cases cited by the State undermine Mr. Suriano's claim.

3. The State's formulation of the forfeiture doctrine is not "narrow" and Mr. Suriano's proposed procedure is not "drastic."

The State argues that this Court should not adopt a mandatory in-court colloquy for cases like Mr. Suriano's because of "the narrowness of the [forfeiture] doctrine itself." (State's brief at 14, 30). The State fails to explain how its formulation of the forfeiture doctrine is "narrow." Under the State's interpretation of the doctrine, a defendant may forfeit the right to counsel even where he did not ask for his attorneys to withdraw and did not act with improper intent. (*See* State's brief at 16, 26).

In addition, the State argues that Mr. Suriano's proposal is "drastic." (*Id.* at 31). Mr. Suriano is simply asking that when a trial court is faced with a defendant whose conduct is disrupting or delaying the trial, that the court place the defendant on notice that his or her conduct is unacceptable, warn the defendant that if the conduct persists the defendant could lose the right to counsel, and advise the defendant of the dangers and disadvantages of self-representation. These minimal steps are not "drastic" or overly-burdensome for circuit courts. The jury instructions committee instructs courts to take these steps; thus, it is likely that many circuit courts already follow this practice. *See* Wis JI–Criminal SM–30.

CONCLUSION

For all of the reasons stated above and in his brief-in-chief, Mr. Suriano respectfully asks this Court to reverse the court of appeals and circuit court and remand for a new trial with the assistance of defense counsel.

Dated this 16th day of November, 2016.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,995 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 16th day of November, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner