STATE OF WISCONSIN

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

DISTRICT III

Case No. 2015AP001293 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and
Denial of Postconviction Motion
Entered in the Brown County Circuit Court, the
Honorable William M. Atkinson, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUE PRESENTED

When a *pro se* litigant requests substitution after remand in a timely manner, the court defers action until after counsel is appointed, and counsel formalizes the substitution request 17 days after appointment, was the request for substitution timely filed?

The circuit court held: The request was untimely.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Zimbal does not request publication or oral argument.

STATEMENT OF THE CASE AND FACTS

The criminal charges in these cases were originally filed in 2010 and 2011. The information in Case No. 10-CF-706 alleged Mr. Zimbal had stalked P.J. between September, 2009 and June, 2010, violating Wis. Stat. § 940.32(2). It also charged disorderly conduct and sending an obscene computer message. (21).[1]

The complaint and information in Case No. 11-CF-231 alleged that Mr. Zimbal had stalked J.A.J. between July, 2010 and February, 2011, again violating Wis. Stat. § 940.32(2). It also alleged two counts of bail jumping. (1, 7).

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[1] Record citations throughout this brief are to the record in Case No. 10-CF-706 unless otherwise noted.

In June, 2011, Mr. Zimbal entered no contest pleas to one count of stalking in Case No. 10-CF-706 and one count of bail jumping in Case No. 11-CF-231, in the Brown County Circuit Court, the Honorable William Atkinson, presiding. (169:5-6). He was convicted and sentenced to consecutive, maximum sentences, totaling nine years, six months in prison. (10-CF-706:58, 11-CF-231:23).

Mr. Zimbal filed a postconviction motion to vacate his convictions and withdraw his pleas. Judge Atkinson denied the motion. (74, 77).

The court of appeals summarily reversed Mr. Zimbal's convictions and the denial of the postconviction motion. The case was remanded to the circuit court on October 8, 2013. (*See* 2012AP2234, 2012AP2235). The two cases were joined for all post-remand proceedings.

Substitution Request

On October 7, 2013, the day before remand, Judge Atkinson held a status hearing. The state informed the court that the attorney general's office would not "appeal" the court of appeals decision. The court then said it would allow Mr. Zimbal to withdraw his pleas, as mandated by the court of appeals. The court also reinstated cash bail. (174:2).

First Assistant State Public Defender Jeff Cano, who appeared with Mr. Zimbal at the hearing, asked that the case be scheduled for a status hearing to allow appointment of an attorney for Mr. Zimbal. (174:2-3). Mr. Zimbal asked for a reduction in bail, then said:

> Mr. ZIMBAL: I'm also asking that you recuse yourself because there is no way you can be impartial and/or bias (sic).
>
> THE COURT: Since you probably haven't done any research, I'll let your attorney do research on that issue and you can address that at the status conference. I'll deny your request at this time.
>
> MR. ZIMBAL: I spoke to [Appellate] Attorney [Eileen] Hirsch this morning, and she said absolutely you can't do that. The Judge must recuse himself.
>
> THE COURT: All right. He can provide his authority for that at the status conference, and he can send it by letter beforehand, by the way, if you want it addressed beforehand.

(174:5; App. 109).

Mr. Zimbal wrote to the court of appeals, expressing concern that the circuit court had denied his motion for recusal. (*See* 2012AP2234, 2012AP2235). On October 17, 2013, Court of Appeals Clerk Diane M. Fremgren replied to Mr. Zimbal's letter, with a copy to Judge Atkinson. Clerk Fremgren described Mr. Zimbal's letter as "regarding substitution or recusal of Judge Atkinson." It said the court of appeals no longer had jurisdiction over the matter, and suggested that Mr. Zimbal consult with his trial counsel. That letter was filed in the circuit court on October 22, 2013. (100; App. 110).

On October 29, 2014, Mr. Zimbal appeared without counsel. The court took notice of a request filed by the public defender's office asking for additional time to appoint an attorney, and rescheduled the hearing for three days later, on November 1, 2013. (176:3).

On November 1, 2013, defense counsel was appointed to represent Mr. Zimbal. (103, 163:2). Defense counsel filed a request for substitution of judge on November 18, 2013. (105; App. 111-12). The request pointed out that substitution is authorized pursuant to Wis. Stat. § 971.20(7) within 20 days of the filing of remittitur. It requested that the substitution request be deemed timely for two reasons:

> First, Mr. Zimbal had made a pro se written request for substitution within the statutory deadline, although it was directed to the wrong court.
>
> Second, Mr. Zimbal was not represented by counsel until after the statutory deadline had elapsed.

Judge Atkinson denied the request for substitution on November 22, 2013, saying "defendant did not comply with Wis. Stats. § 971.20(7)." (106; App. 108).

After a jury trial, Mr. Zimbal was found guilty of all three counts in Case No. 10-CF-706, and all three counts in Case No. 11-CF-231. (86:52-53).

At sentencing, Judge Atkinson sentenced Mr. Zimbal to consecutive, maximum sentences totaling nineteen years, six months in prison. (87:33-334; App. 100-106).

Mr. Zimbal filed a postconviction motion requesting a new trial in the interest of justice, or alternatively, a new trial because of ineffective assistance of counsel. (142). Judge Atkinson denied the postconviction motion. (154; App. 107).

Mr. Zimbal filed a notice of appeal from his conviction and from denial of his postconviction motion. On July 6, 2015, the court of appeals granted Mr. Zimbal's motion to consolidate these cases on appeal.

ARGUMENT

When Mr. Zimbal Filed a Timely Pro Se Request for Substitution, the Court Deferred Action Until Counsel was Consulted, and Counsel Formalized the Substitution Request 17 Days After Appointment, the Request for Substitution Was Timely Filed.

A. Introduction and standard of review.

Wisconsin Statute § 971.20(7) provides that when an appellate court orders a new trial or sentencing, the defendant has the right to substitution of judge. The request must be filed "within 20 days after the filing of the remittitur by the appellate court."

Mr. Zimbal did everything within his power to make a timely request for substitution. He made an oral request at the status hearing the day before remittitur, and he made a written request to the court of appeals that was filed in the circuit court within 14 days of remittitur. In both cases, the courts told him to consult with counsel. However, no counsel was appointed for him until 25 days after the remittitur was filed.

Wisconsin courts have historically rejected application of Wis. Stat. § 971.20 deadlines in a way that violates the intention of the legislature or is unjust. Here, there are three alternative and well-founded legal analyses that lead to the same result: the circuit court erred when it denied Mr. Zimbal's motion for substitution of judge.

First, Mr. Zimbal made an oral and a written substitution request within 14 days of remitter. Although he used the word "recusal," it is well established that a *pro se* litigant's pleadings must be construed liberally. ***State ex rel. L'Minggio v. Gamble,*** 263 Wis. 2d 45, ¶ 44, 677 N.W. 2d 1 (2003). Mr. Zimbal's substitution requests, therefore, were timely filed.

Second, alternatively, the court should apply the equitable "tolling rule" to the facts of this case because circumstances beyond Mr. Zimbal's control, the delay in appointment of counsel by the State Public Defender, resulted in the belated filing of the request. *See* ***State ex rel. Nichols v. Litscher***, 247 Wis. 2d 1013, 635 N.W. 2d 292 (2001).

Third, alternatively, the court should construe § 971.20(7) liberally to give effect to the predominant intention of the legislature, as it has done in other cases involving substitution requests. ***Baldwin v. State,*** 62 Wis. 2d 521, 530, 215 N.W. 2d 541 (1974).

For the court's convenience, a chart of the relevant dates, as described in the statement of facts is provided here:

October 7, 2013	Status Hearing Pleas Withdrawn, Bail Set, Oral Substitution Request Made and Denied "At This Time."
October 8, 2013	Remittur Filed
October 22, 2013	Court of Appeals Letter Regarding "Substitution or Recusal of Judge Atkinson" Filed in Circuit Court
October 28, 2013	Statutory Deadline 20 Days After Remittitur
October 29, 2013	Status, No Defense Attorney Appointed, Set Over

November 1, 2013	Attorney Appointed
November 18, 2013	Attorney Files Written Substitution Request
November 22, 2013	Request Denied as Untimely

B. Mr. Zimbal's request for substitution was timely filed.

Mr. Zimbal made his oral request for substitution at the earliest possible opportunity – before remittitur and on the same day that the circuit court set bail and directed that Mr. Zimbal's convictions be vacated. (174:5; App. 109).

Although Mr. Zimbal used the word "recusal" instead of "substitution," a *pro se* litigant's pleadings must be construed liberally. ***L'Minggio v. Gamble, supra***, 263 Wis. 2d 45, ¶ 44. In ***State v. Harrison,*** 2015 WI 5, 360 Wis. 2d 246, ¶ 26, 858 N.W. 2d 372, the court accepted *pro se* substitution requests similar to Mr. Zimbal's, saying: "Although the defendant used phrases like 'change of judge' and 'recusal' in some of his filings . . . the defendant's goal was clear: He did not want Judge Counsell on the instant case. . . ." Mr. Zimbal's goal was equally clear.

Mr. Zimbal's statement that he had been given legal advice that "absolutely" the judge "must recuse himself" was sufficient to alert the court that his request for recusal was intended to be a request for substitution. (174:5; App. 109). A similar statement made a few days later to the court of appeals alerted that court that it was a request for "substitution or recusal of Judge Atkinson." (100; App. 110).

The court did not decide the recusal request on its merits at the October 7, 2013, hearing. Rather, it denied the request "at this time" to allow attorney consultation. It said the request could be addressed at a status conference. (174:5). The court's statement of temporary denial with a promise of a later hearing, held the request in abeyance until Mr. Zimbal was appointed legal counsel.

It might be argued that Mr. Zimbal's oral substitution request was insufficient to invoke his right to substitution pursuant to § 971.20(7) because the statute can be construed as requiring a written request. Here, however, Mr. Zimbal's oral request was memorialized in writing and filed in the court of appeals on October 15, 2013. (*See* 2012AP2234, 2012AP2235). The court of appeals response was filed in the circuit court on October 22, 2013. (100; App. 110).

The letter from the court of appeals specifically alerted the circuit court that Mr. Zimbal's request should be construed as a request for substitution when it described the request as regarding "substitution." Mr. Zimbal's written request and the court of appeals' clarification, was filed within 14 days after remittitur. (100; App. 110). Therefore, if § 971.20(7) requires a written request, this *pro se* filing met the statutory requirement.

Given this history, Attorney Hanes' written request for substitution filed on November 18, 2013, was merely a more formal renewal of the pending request for substitution, which had been held in abeyance by the court until an attorney could be appointed to consult with Mr. Zimbal. It was not a new request, and as such, it was not untimely.

C. The equitable tolling rule should be applied to Mr. Zimbal's request for substitution because forces beyond his control precluded a lawyer-filed substitution request within 20 days of remittitur.

The court's refusal to consider a request for substitution until Mr. Zimbal was represented by a lawyer, placed him in a "Catch 22" situation. He could not file an acceptable request for substitution until he had a lawyer, but he could not get a lawyer until one was assigned by the State Public Defender. Mr. Zimbal took every action he could to request substitution, but forces beyond his control precluded a lawyer-filed substitution request within the 20 day deadline in Wis. Stat. § 971.20(7).

In situations like this, Wisconsin appellate courts have recognized the fundamental unfairness of enforcing deadlines for filing court documents when a litigant has no control over the timing of the filing. When circumstances beyond the control of a litigant result in belated filing of court documents, the courts have applied an equitable "tolling rule." In ***State ex rel. Walker v. McCaughtry,*** 2001 WI App 110, 244 Wis. 2d 177, 629 N.W. 2d 17, the court held that a deadline is tolled "when the documents over which prisoners have control have been mailed, and all of the documents over which prisoners have no control have been requested." The tolling rule was adopted by the Wisconsin Supreme Court in ***State ex rel. Nichols v. Litscher,*** 247 Wis. 2d 1013, 635 N.W. 2d 292 (2001). The court held that its thirty-day deadline for receipt of a petition for review "is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing." ***Id.,*** ¶ 32.

Application of the equitable tolling rule in this case would toll the § 971.20(7) deadline from October 7, 2013, the date on which Mr. Zimbal's substitution request was deferred by the court until he consulted with a lawyer, until November 1, 2013, the date on which a lawyer was appointed to represent him. As a result, Mr. Zimbal's substitution request, filed 17 days after a lawyer was appointed, was filed within the 20-day deadline under § 971.20(7).

Application of the equitable tolling rule is appropriate in this case. As a result, Mr. Zimbal's substitution request was timely filed.

D. Wisconsin Statute § 971.20(7) must be applied reasonably, not strictly, to effectuate the predominant intention of the legislature.

Wisconsin appellate courts have also recognized the fundamental unfairness of applying § 971.20 deadlines strictly when "a strict construction makes it impossible to obtain the objective of this section and would frustrate the objective of the statute." ***Baldwin v. State,*** 62 Wis. 2d 521, 530, 215 N.W. 2d 541 (1974).

In the ***Baldwin*** decision, the court described a calendaring system in which the trial judges were not assigned until after arraignment, making it impossible for a defendant to file a timely, intelligent substitution request pursuant to Wis. Stat. § 971.20(4) requirements. For purposes of application of Wis. Stat. § 971.20, the court held, "arraignment" would not be completed until the trial judge confirmed the plea and set a trial date. "This interpretation witnesses and gives effect to the predominant intention of the legislature expressed in the section to 'afford a substitution of a new judge assigned to the trial of that case,'" the court held. ***Id.,*** at 530.

In other cases, in which "the vagaries of practice and procedure," have made strict application of § 971.20 deadlines inequitable, courts have consistently construed the statute to afford the defendant "a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case," but not to allow a defendant to "disrupt orderly calendaring or to delay the scheduled trial." ***Clark v. State***, 92 Wis. 2d 617, 627, 286 N.W. 2d 344 (1979), ***State ex rel. Tinti v. Circuit Court for Waukesha County, Branch 2***, 159 Wis. 2d 783, 788, 464 N.W. 2d 853 (Ct. App. 1990).

A reasonable interpretation of Wis. Stat. § 971.20(7) in this case would result in the conclusion that the November 18, 2013, substitution request was timely for several reasons. First, like Mr. Harrison, Mr. Zimbal had made it clear prior to appointment of counsel that he did not want Judge Atkinson to hear this case. *See* ***Harrison, supra***, ¶ 26. Second, Mr. Zimbal's attorney filed the substitution request only 17 days after he was appointed to represent Mr. Zimbal – by statutory definition a reasonable time period.

Third, the substitution request did not disrupt orderly calendaring or delay a trial. No pretrial motions had been filed, no pretrial conferences had been held. On December 2, 2013, fourteen days ***after*** he filed the substitution request, defense counsel requested an adjournment of the trial date, explaining "this is a substantial file," and "I only received documents from prior counsel a matter of days ago." (177:2). Given the length and complexity of the record, it was inconceivable that Attorney Hanes could have been prepared for a trial in early December, 2013.

Therefore, when the statute is construed in a way that "gives effect to the predominant intention of the legislature," the November 18, 2013, request should be deemed timely.

E. Mr. Zimbal did not forfeit his right to substitution.

In ***State v. Damaske***, 212 Wis. 2d 169, 567 N.W. 2d 905 (Ct. App. 1997), the court held that a defendant who entered a no-contest plea after his substitution request is denied, had forfeited his right to substitution. The decision in ***Damaske,*** however, does not apply to this case because Mr. Zimbal did not enter a plea. He took the case to trial.

The ***Damaske*** court specifically recognized that forfeiture is not applicable when a defendant takes a case to trial. It held that there are three ways that Mr. Damaske could have challenged the denial of his substitution request. The third way was this: "[H]e could have gone to trial before Judge Sykes and, if convicted, challenged on appeal Judge Sykes's denial of the substitution request." ***Id.*** at 186-87.

Mr. Zimbal did exactly what was suggested. He went to trial before Judge Atkinson, and when convicted, challenged on appeal Judge Atkinson's denial of the substitution request.

F. Harmless error analysis does not apply.

Last year, the Wisconsin Supreme Court held that harmless error analysis does not apply when "such an analysis effectively nullifies a right granted by statute." ***State v. Harrison, supra,*** 360 Wis. 2d 246, ¶ 87. The court explained that the statute "does not require a defendant to provide a reason for the requested substitution or to

demonstrate that prejudice would result from the substituted judge's presiding." ***Id.***, ¶ 88. The court declined to "add an element to the substitution statute that the legislature did not enact." ***Id.,*** ¶ 90

"In sum," the court held, "application of a harmless error analysis . . . would undercut Wis. Stat. § 971.20 by nullifying the defendant's statutory right to request and obtain substitution without any showing of prejudice." ***Id.,*** ¶ 91. Therefore, harmless error analysis does not apply in this case.

CONCLUSION

Mr. Zimbal did everything within his power to make a timely request for substitution. Under any accepted legal analyses, the conclusion is the same: the circuit court erred when it denied Mr. Zimbal's motion for substitution of judge. Mr. Zimbal did not forfeit his right to substitution by filing an appeal after he was convicted by a jury and sentenced. Harmless error analysis does not apply.

For these reasons, Mr. Zimbal respectfully requests that the court vacate the judgments of conviction entered in these cases, and remand the cases to the circuit court for a new trial.

Dated this 22nd 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 3,065 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 22nd day of September, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of September, 2015.

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