

RECEIVED

12-07-2015

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP1292-CR & 2015AP1293-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION FOR
POSTCONVICTION RELIEF, ENTERED IN BROWN
COUNTY CIRCUIT COURT, THE HONORABLE
WILLIAM M. ATKINSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809/(608) 266-9594 (Fax)
noetna@doj.state.wi.us

TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE	2
ARGUMENT	6
ZIMBAL’S REQUEST FOR SUBSTITUTION OF JUDGE WAS UNTIMELY AND HE HAS NOT PROVIDED A BASIS FOR RELIEF FROM THE STATUTORY DEADLINE.	6
CONCLUSION.....	12

Cases Cited

Baldwin v. State, 62 Wis. 521, 215 N.W.2d 541 (1974)	10, 11
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).....	6, 7
State ex rel. Nichols v. Litscher, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001)	10
State ex rel. Walker v. McCaughtry, 2001 WI App 110, 244 Wis. 2d 177, 629 N.W.2d 17	10

	Page
State v. Goodson, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385	6, 7, 8
State v. Harrison, 2015 WI 15, 360 Wis. 2d 246, 858 N.W.2d 372	6, 7, 8

Statutes Cited

Wis. Stat. § 757.19(2)(g)	7
Wis. Stat. § 971.20	8
Wis. Stat. § 971.20(10).....	8, 9
Wis. Stat. § 971.20(7).....	5, 6, 8

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT III

Case No. 2015AP1292-CR & 2015AP1293-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION FOR
POSTCONVICTION RELIEF, ENTERED IN BROWN
COUNTY CIRCUIT COURT, THE HONORABLE
WILLIAM M. ATKINSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.¹ Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

On September 4, 2013, this court reversed Edward Zimbal's convictions in two cases consolidated for appeal and remanded the cases to the circuit court with instructions that Zimbal be allowed to withdraw his no contest pleas (91).² The cases were remitted to the circuit court on October 8, 2013 (96).

One day earlier, the circuit court held a status conference (174). The court permitted Zimbal to withdraw his pleas, reinstate cash bail and ordered Zimbal's transfer to the jail to await trial (174:2, 4). Zimbal's attorney, Jeffrey J. Cano, asked that the cases be set for a status conference to determine who would be Zimbal's attorney going forward (174:2-3). After the court denied Zimbal's request for a signature bond (174:4), Zimbal then asked the judge to recuse himself based on the belief that the judge was unable to be fair and impartial:

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.

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

² The cases remain consolidated for this appeal, and the record citations in this brief are to the record for 2015AP1292-CR unless otherwise noted.

MR. ZIMBAL: I spoke to Attorney Hirsch³ 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).

When Zimbal was not produced for a status conference on October 15, 2013, the circuit court rescheduled the hearing for October 29, 2013 (175).

On October 17, 2013, the Clerk of Court of Appeals responded to a letter that Zimbal had sent to the court of appeals (100). The letter was addressed to Zimbal, with copies to the circuit court, the clerk of circuit court, the local prosecutor, Zimbal's appellate attorney and the Department of Justice (100). The letter read:

The court has asked me to respond to your October 7, 2013 letter⁴ regarding substitution or recusal of Judge Atkinson. The records in these cases has been remitted to the circuit court and this court has no jurisdiction after remittitur. Therefore, the court will take no action on your letter. We suggest that you consult with your trial counsel about how to proceed.

(100).

On October 29, 2013, Zimbal appeared for his status conference without counsel (176:2). At that hearing, Zimbal shared a letter he had received from Attorney Hirsch,

³ It appears that both Zimbal and Attorney Cano believed that Assistant State Public Defender Eileen A. Hirsch would be representing Zimbal in further circuit court proceedings (*see* 173:2; 174:5). Attorney Hirsch handled Zimbal's prior appeal and continued to serve as his postconviction and appellate attorney in these cases.

⁴ Zimbal's letter is not included in the appellate record.

informing him that a local trial attorney was to be appointed to his case (176:2-3). For some reason, Zimbal's new attorney did not appear at the status conference (176:3). The court set another status of counsel date on the following Friday, which was November 1, 2013 (102; 176:3). Zimbal did not revisit the issue of Judge Atkinson's recusal, but he did move and argue for a bail reduction (176:4-6).

The record includes an order appointing Attorney Ben Hanes as Zimbal's trial counsel (103). That order is dated October 29, 2013, and it shows the next court date as October 29, 2013 (103). The order was filed on November 1, 2015 (103). Attorney Hanes appeared with Zimbal on November 1, 2013 (104). There is no transcript of that hearing, but the court minutes indicate that Attorney Hanes made a motion to modify Zimbal's bail to a signature bond (104:2). The minutes do not reference anything about Judge Atkinson's recusal or substitution of judge (103). The case was set for a final conference on December 2, 2013 (104:1).

On November 18, 2013, Zimbal filed a written request for substitution of judge (105). Zimbal acknowledged that the request was beyond the statutory deadline, but asked the circuit court to find that the request was timely for two reasons: (1) his earlier letter to the court of appeals, although sent to the wrong court, constituted a timely written request for substitution,⁵ and (2) his new trial counsel had not been appointed until after the deadline passed (105).⁶ The circuit court denied Zimbal's request for

⁵ Although Zimbal characterizes his letter as a request for substitution, the contents of Zimbal's letter are completely unknown. Zimbal's submission did not include a copy of that letter (105), and the letter is not part of the record.

⁶ Zimbal's request for substitution of judge also alleges that he was not represented by counsel until Attorney Ben Hanes was appointed on or about November 1, 2015 (105). To the contrary, the record demonstrates that he was represented by Attorney Jeffrey Cano leading up to Attorney Hanes's appointment (*see* 173 & 174). The record also

substitution of judge for failure to comply with Wis. Stat. § 971.20(7) (106).⁷

The cases proceeded to jury trial, and Zimbal was convicted of six charges: two counts of stalking (separate victims), disorderly conduct, computer message-threaten/obscenity, and two counts of felony bail jumping (126). Zimbal was sentenced to a total of nine and a half years of initial confinement and ten years of extended supervision (2015AP1292-CR:130 and 131; 2015AP1293-CR:69).

Attorney Hanes filed a notice of intent to pursue postconviction relief, and Attorney Hirsch represented Zimbal in postconviction proceedings (132; 133; 134). On April 29, 2015, Attorney Hirsch filed a motion for new trial based on allegations that jury had been both deprived of important evidence and permitted to hear significant and improper evidence (142:1-14; 181). Attorney Hirsch also claimed that Zimbal's trial attorney had been ineffective in several respects (142:14-15; 181). The motion did not include a claim that any of Zimbal's attorneys, including herself, had been ineffective for failing to file a timely request for substitution on judge (142; 181). Following an evidentiary hearing, the circuit court issued an order denying the motion (154).

indicates that Zimbal was consulting with Attorney Hirsch during that time period (*see* 100; 173:2; 174:5; 176:2-3).

⁷ That provision reads:

(7) Substitution of Judge Following Appeal. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

Wis. Stat. § 971.20(7).

This appeal followed, with the only issue being the circuit court's rejection of Zimbal's November 18, 2015 request for substitution of judge.

ARGUMENT

ZIMBAL'S REQUEST FOR SUBSTITUTION OF JUDGE WAS UNTIMELY AND HE HAS NOT PROVIDED A BASIS FOR RELIEF FROM THE STATUTORY DEADLINE.

The parties agree that Zimbal's deadline for filing a written request for substitution of judge was twenty days from the October 8, 2013 remittitur in these cases (96). Wis. Stat. § 971.20(7). The request Zimbal filed on November 18, 2015, was unquestionably late. After losses at trial and in postconviction proceedings, Zimbal now claims that he did make a timely request for substitution, or that he at least "did enough" to warrant an exemption from the statutory deadline. The record, however, belies Zimbal's allegations.

In support of his claims, Zimbal first offers an oral request that he made for the circuit court judge to recuse himself based on Zimbal's allegation that there was "no way [the judge] can be impartial and/or bias (sic)" (174:5). Zimbal suggests that the term recuse/recusal is akin to substitution, but it isn't.⁸ A defendant may assert his statutory right to substitution of judge without stating a reason for the request. Wis. Stat. § 971.20(7); *State v. Harrison*, 2015 WI 15, ¶ 39, 360 Wis. 2d 246, 858 N.W.2d 372. Recusal, or disqualification, is different. A judge is presumed to act

⁸ A judge is presumed to act fairly, impartially and without prejudice. *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385. A defendant may overcome that presumption by establishing that the appearance of bias shows a great risk of actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009); *Goodson*, 320 Wis. 2d 166, ¶ 14. A defendant may assert his statutory right to substitution of judge without stating a reason for the request. Wis. Stat. § 971.20(7); *State v. Harrison*, 2015 WI 15, ¶ 39, 360 Wis. 2d 246, 858 N.W.2d 372.

fairly, impartially and without prejudice. *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385. A defendant may overcome that presumption by establishing that the appearance of bias shows a great risk of actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009); *Goodson*, 320 Wis. 2d 166, ¶ 14; see Wis. Stat. § 757.19(2)(g). Zimbal's request for recusal was not tantamount to a request for substitution.

And Zimbal's request for recusal is not entitled to the more liberal construction afforded pro se defendants because he *wasn't* pro se when he made the request. Zimbal was represented by Attorney Cano at the hearing where he asked the circuit court judge to recuse himself (174). Zimbal also stated that he had discussed the issue with his postconviction/appellate counsel, Attorney Hirsch, who told him that the judge "must recuse himself" (174:5). In response, the circuit court judge stated that he would allow Zimbal's attorney to research the issue and submit authority for the recusal request either at the next scheduled hearing or by letter beforehand (174:5).⁹

Based on Zimbal's statements about recusal, in the presence of his lawyer, there was no reason for the circuit court to believe that Zimbal wanted to exercise his right of substitution.¹⁰ His own attorneys apparently didn't believe

⁹ Assuming Zimbal's statement is correct and he talked with Attorney Hirsch about the circuit court judge's recusal, the specifics of the conversation remain unclear. It is entirely possible that Attorney Hirsch consulted with Zimbal about the issue and ultimately concluded that there was no basis for it.

¹⁰ Zimbal relies on *State v. Harrison*, 2015 WI 5. 360 Wis. 2d 246, 858 N.W.2d 372, for the proposition that his single request for "recusal" ought to be interpreted as a request for substitution. His reliance is misplaced. In *Harrison*, the defendant made a proper request and the request was granted before the original judge came back and continued to preside over the case. *Harrison*, 360 Wis. 2d 246, ¶ 2. And, after the judge's return, the defendant "persisted with his substitution request throughout the proceeding." *Id.* ¶ 8. In that context, our supreme court concluded that the defendant's use of phrases like "change of judge" and

it, either. Although Attorney Hirsch now argues that Zimbal's statements should have been interpreted as a request for substitution, neither she nor Attorney Cano filed a proper request for substitution based on those very same statements and/or their communications with Zimbal.

Even if Zimbal's oral request for recusal could be interpreted as a request for substitution, it would be insufficient because a request for substitution must be in writing. *See* Wis. Stat. § 971.20(7). Zimbal acknowledges that requirement, but argues that he submitted a proper, written request for substitution when he sent a letter dated October 7, 2013, to this court (Zimbal Br. 9). That letter, however, is not even part of the record. The October 17, 2013 response from Clerk of Court of Appeals referred to Zimbal's "letter regarding substitution or recusal of Judge Atkinson[.]" and advised him to discuss the matter with his attorney (100). Neither Zimbal's missing letter nor the clerk's reply can be deemed a proper written request for substitution of judge.¹¹

Even after Zimbal appeared in court with a new trial attorney, almost three weeks passed before a formal written request for substitution was finally filed with the circuit court (103; 104; 105). The request asked the circuit court to deem the request timely based simply on Zimbal's prior letter to this court and the date of his appointment as Zimbal's successor counsel (105). The circuit court saw no merit in Zimbal's claims and properly denied Zimbal's substitution request as untimely.

"recusal" in some of his filings were sufficient to demonstrate that he had not forfeited or abandoned his earlier substitution request. *Id.* ¶¶ 8, 26, 74. The circumstances presented here are clearly different.

¹¹ Wis. Stat. § 971.20(10) provides a simple example of the form that requests for substitution should take. The form should be addressed to the circuit court and state "Pursuant to Wis. Stat. § 971.20 the defendant (or defendants request(s) a substitution for the Hon. as judge in the above entitled action" *Id.* The request must be signed by defendant or the defendant's attorney. *Id.*

Reading Zimbal's brief, one would be led to believe that he had absolutely no legal representation until Attorney Hanes was appointed on November 1, 2013. All of his claims for relief, including his claim for relief under the equitable tolling rule, hinge his alleged "pro se" efforts to exercise his right of substitution and the related unfairness of applying the twenty day deadline prior to Attorney Hanes's appointment. Again, the record contradicts Zimbal's version of events.

In truth, Zimbal was represented by counsel well before Attorney Hanes was appointed and during the twenty days following remittitur. On October 7, 2013, Attorney Cano represented Zimbal at the very hearing where Zimbal asked the circuit court judge to recuse himself (174). At that time, Zimbal also claimed that he had consulted Attorney Hirsch about the issue (174:5). A substitution of judge requires nothing more than the filing of a very simple form. Wis. Stat. § 971.20(10). Had Zimbal actually informed either Attorney Cano or Attorney Hirsch that he wanted to file a request for substitution of judge, surely one of them would have done so. In the alternative, their failure to act on Zimbal's stated desire to substitute judges would have constituted ineffective assistance of counsel. No such claim has ever been made in these cases.

Attorney Hanes's November 18, 2013 request for substitution of judge did not allege that Zimbal had asked either Attorney Cano or Attorney Hirsch to assist him with filing a request for substitution of judge (105). In her postconviction motion for a new trial, Attorney Hirsch did not raise an issue of ineffective assistance of counsel for failure to file a timely request for substitution based on Zimbal's wishes (142; 181). Even if she had been responsible for failing to honor Zimbal's wishes, she would have confessed the error on behalf of her client. Based on the record in these cases, the only reasonable conclusion is that Zimbal did not communicate with any of his attorneys about his desire to file a request for substitution of judge until it was far too late.

Contrary to Zimbal's argument on appeal, the record does not demonstrate that he "did everything within his power to make a timely request for substitution" (Zimbal Br. 5). While Zimbal expressed some dissatisfaction with the circuit court judge and inquired about the judge's "recusal," the attorneys who represented him at the time did not file a timely, written request for substitution of judge, and Zimbal has never claimed that they were ineffective for failing to do so. Given the circumstances, the time it took to appoint Zimbal's successor counsel was irrelevant, and it does not warrant application of the equitable tolling rule to exempt Zimbal from the statutory deadline for substitution requests.¹²

For similar reasons, Zimbal is not entitled to relief because the circumstances of these cases made it *impossible* for him to file a timely request for substitution. *Baldwin v. State*, 62 Wis. 521, 530, 215 N.W.2d 541 (1974). In *Baldwin*, the circuit court calendared cases in a way that prevented defendants from knowing who their assigned judges were before the deadline for requesting substitution had passed.

¹² The cases cited by Zimbal in support of his equitable tolling argument, *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, 244 Wis. 2d 177, 629 N.W.2d 17, and *State ex rel. Nichols v. Litscher*, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001), both dealt with the tolling of deadlines for prisoner filings that were dependent on the independent operation of the prison system (like the processing of mail and inmate trust accounts). Because prisoners have no control over delays associated with prison operations, courts have employed the equitable tolling rule to relieve prisoners of certain filing deadlines when their submissions were late due exclusively to the prison's operations and not the prisoners' conduct. Zimbal has not cited any cases applying the equitable tolling rule to criminal cases and situations like the one presented here. That is not terribly surprising given the fact that so many criminal defendants, like Zimbal, are represented by attorneys who are duty-bound to ensure that required pleadings are filed. In the event counsel improperly fails to meet a deadline and her client suffers prejudice, the defendant has recourse by way of an ineffective assistance of counsel claim – a claim that Zimbal has not raised in these cases.

Because that system made it impossible for defendants to make knowing and timely substitution requests, our supreme court construed the statute to permit defendants to exercise their right of substitution after learning who their trial judges would be. *Id.*

Once again, this case is different. Well before the statutory deadline for a substitution request, Zimbal raised the issue of “recusal” with the circuit court (174:5). His lawyer at the time, Attorney Cano, was present at that hearing, and Zimbal informed the court that he had also discussed the matter with Attorney Hirsch (174:5). The circuit court allowed Zimbal and his counsel time to research the issue and present related authority to the court on or before the next court date. That was on October 7, 2013 – the day *before* remittitur (174). Despite the opportunity, no motion for recusal was filed, and the issue never came up again. No timely request for substitution was filed. There has never been a related ineffective assistance of counsel claim. In other words, Zimbal and his attorneys easily could have filed a timely request for substitution of judge, but they didn’t.

CONCLUSION

For the foregoing reasons, this court should affirm both the circuit court's decision denying Edward Zimbal's request for substitution of judge and his related judgments of conviction.

Dated this 7th day of December, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809/(608) 266-9594 (Fax)
noetna@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,196 words.

Nancy A. Noet
Assistant Attorney General

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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 7th day of December, 2015.

Nancy A. Noet
Assistant Attorney General