STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The state's supplemental fact statement makes false and unsupported assertions that Mr. Zimbal was represented, either by Attorney Jeffrey Cano or Attorney Eileen Hirsch, during the statutory time period for filing a substitution request.

The state first asserts that both Mr. Zimbal and Attorney Jeffrey Cano believed Attorney Hirsch, his appellate attorney, would be representing Mr. Zimbal in further circuit court proceedings. (Brief, p. 3, fn. 3).[1] However, on the next page of its brief, the state asserts that Mr. Zimbal "was represented by Attorney Jeffrey Cano" during the applicable time period. (Brief, p. 4, fn. 6). These fact assertions are affirmatively contradicted by the record.

Four days before remittitur, at a status hearing on October 4, 2013, Attorney Cano initially said he believed that Mr. Zimbal would be represented by Attorney Hirsch. (173:2; App. 102). However, the hearing was set over because the time period for the state to file a petition for review had not ended and the case had not yet been remitted to the circuit court. (173:2-5; App. 102-05).

When the hearing resumed on October 7, 2013, Attorney Cano clarified that new trial counsel would be appointed for Mr. Zimbal by the state public defender. At the

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[1] Appellate counsel had been appointed pursuant to Wis. Stat. § 809.30(2), after Mr. Zimbal filed notices of intent to pursue postconviction relief from his 2011 convictions. (10-CF-706:59; 11-CF-231:24). That appellate appointment ended with remittitur, however, when the case was remanded for further proceedings in the *trial* court. (10-CF-706:96; 11-CF-231:44).

outset of the October 7 hearing, the court did not introduce Mr. Cano as Mr. Zimbal's attorney. Rather, it said: "In the courtroom is Attorney Jeffrey Cano." (174:2; App. 108). The court then asked Attorney Cano: "Do you want to pick a trial date, Mr. Cano, or do you believe some other attorney will be actually handling the trial?" (174:2; App. 108). Attorney Cano responded that he would like to have Mr. Zimbal transported from prison for an initial appearance "[b]ecause then we'll discuss with him the appointment of attorney." (174:2; App. 108).

The court asked: "So, should I just put it on for status then so we can get the attorney lined up?" Attorney Cano answered "yes." (174:3; App. 109).[2]

Mr. Zimbal also made his own motions to modify the cash bond and for "recusal," at that hearing, reflecting his understanding that he was not represented by counsel. Mr. Cano said nothing on his behalf. Mr. Zimbal mentioned that he had talked to Attorney Hirsch about "recusal," but he made no suggestion that Attorney Hirsch would continue to represent him. (174:4; App. 111). As to both motions, the court denied them with the qualification that they could be addressed at the next status hearing when counsel had been appointed. (174:4-5; App. 110-111).

All of this took place before remittitur, which was issued on October 8, 2013, and filed in the circuit court on October 11, 2013. (96).

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[2] Attorney Cano, the Regional Attorney Manager in Green Bay, had the administrative responsibility, assigned to the public defender by Wis. Stat. § 977.08, to appoint counsel for indigent defendants. Pursuant to Public Defender Administrative Rule 2.03(6), he was the appointed administrative representative for the Green Bay area.

Mr. Zimbal was not represented by counsel at status hearings scheduled on October 15, 2013, and October 29, 2013. (175; App. 112-113; 176; App. 114-119).

On October 29, 2013, when Mr. Zimbal appeared without counsel, the court stated that it had called the public defender's office and "I think we've been able to determine there is no one appointed for you at this time." (176:2; App. 115). It advised Mr. Zimbal: "you should have an attorney appointed for you. So, they haven't appointed one yet. So, I presume you are requesting an appointment by the public defender?" (176:2; App. 115). Mr. Zimbal answered affirmatively.

Later in the hearing, the court said: "the public defender's office is requesting a week [adjournment] because they apparently have not been able to find an attorney to take your case yet." (176:3; App. 116). Mr. Zimbal referred to a letter from Ms. Hirsch saying "a local trial attorney would be appointed for him." (176:2; App. 115).

As the state points out, Mr. Zimbal first appeared in court with counsel on November 1, 2013. (11-CF-231, 84). Counsel pointed out that he had "just recently been appointed" and that he had "just briefly spoken to Mr. Zimbal." (11-CF-231, 84:2). [3]

[3] The state mistakenly asserts that the transcript of the November 1, 2013, hearing is not in the appellate record. It is, and it is correctly cited above. Undersigned counsel acknowledges, however, that she incorrectly cited the wrong record number in the brief in chief.

ARGUMENT

I. 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.

The state's entire argument is built on its false factual assumption, explained above, that Mr. Zimbal was represented by a lawyer – either Mr. Cano or Ms. Hirsch – during the post-remittitur hearings held between October 8 and November 1, 2013.

From that false premise, the state makes arguments that Mr. Zimbal's request is not entitled to the more liberal construction afforded *pro se* defendants; that his "own attorneys apparently didn't believe" he wanted substitution because those attorneys didn't file substitution requests; that if he had asked, one of his "own attorneys" would have filed the request because it required "nothing more than the filing of a very simple form;" and that if Mr. Zimbal has a claim it is one of ineffective assistance of counsel for his "own attorneys'" failure to file the substitution request. (Brief, pp. 7-9).

All of those arguments fail because they have no factual basis. Mr. Zimbal was not represented by a lawyer between October 8 and November 1, 2013.[4] On

[4] The state points out, that the order appointing counsel was signed on October 29, 2013, although the appointment apparently occurred after the court hearing that day. The difference is irrelevant however; the November 18, 2013 substitution request was filed within 20 days of October 29, 2013.

October 7, 2013, the court scheduled the case "for status . . . so we can get the attorney lined up," and on October 29, the court advised Mr. Zimbal that the public defender had not yet appointed an attorney for him. (174:3; 176:2; App. 109, 115). No attorney appeared with Mr. Zimbal at court hearings on October 15 and October 29, 2013, and no attorney filed any motions or requests on his behalf. The simple fact is, he was not represented by counsel during that time period.

When the factual premise of the state's argument is corrected, the entire argument falls. Mr. Zimbal had no attorney who could believe, or not believe, that he wanted substitution and there was no attorney who could provide deficient representation. Mr. Zimbal simply had no attorney. An attorney who did not represent Mr. Zimbal could not ethically file a "simple form" on his behalf.

The state's argument on ineffective assistance has several permutations, in various parts of the state's brief. In the statement of facts, the state points out that the postconviction 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 (sic)." (Brief, p. 5). The state fails to note, however, that the postconviction motion specifically stated Mr. Zimbal's position that "reversible errors regarding substitution" had been preserved for appeal and were therefore not included in the postconviction motion. (142:2).

The state later argues that because no claim of ineffective assistance had been made regarding substitution, "the only reasonable conclusion is that Zimbal did not communicate with any of his attorneys" about substitution. (Brief, p. 9). Again, this argument is based on the false factual premise that Mr. Zimbal was represented by either

Attorney Cano or Attorney Hirsch, or both. In light of the actual facts, "the only reasonable conclusion" is that no substitution request was filed because Mr. Zimbal did not have an attorney to file it.

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

Mr. Zimbal's *pro se* oral request for substitution was made directly to the court on October 7, 2013, and his written request for substitution was filed in the court of appeals on October 15, 2013. (190; App. 120-23). Mr. Zimbal's first argument, therefore, is that his request was timely filed. The court refused to hear or rule on the request and, in effect, held it in abeyance until Mr. Zimbal had consulted with his yet-to-be- appointed attorney. (174:5; App. 111)

Although Mr. Zimbal used the word "recusal," instead of "substitution," it is well established that a *pro se* litigant's pleadings must be construed liberally. The state's erroneous argument notwithstanding, Mr. Zimbal was acting *pro se* when he requested that his case be heard before a different judge. ***State ex rel. L'Minggio v. Gamble,*** 263 Wis. 2d 45, ¶ 44, 677 N.W. 2d 1 (2003).

That general principle was applied recently in ***State v. Harrison,*** 2015 WI 5, 360 Wis. 2d 246, ¶ 26, 858 N.W. 2d 372, where the court accepted *pro se* 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. . . ."

The state argues that ***Harrison*** is not applicable here, because the factual context was different in ***Harrison***. The state does not explain why the factual context changes

the principle, and no such reason is apparent. Like Mr. Harrison, Mr. Zimbal made it clear that his goal was that Judge Atkinson not be on the case. Further, the court of appeals specifically alerted the circuit court to this interpretation of Mr. Zimbal's request when it referenced his request for "substitution or recusal of Judge Atkinson." (100).

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 state's argument on this point is based on its false factual premise that Mr. Zimbal was represented by counsel between October 8 and November 1, 2013. That argument is addressed above and will not be repeated here.

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

The state's argument on this point is again based on its false factual premise that Mr. Zimbal was represented by counsel – Attorney Cano and/or Attorney Hirsch - between October 8 and November 1, 2013. That argument is addressed above and will not be repeated here.

E. Mr. Zimbal did not forfeit his right to substitution, and harmless error analysis does not apply.

Because the state has not contested these arguments in Mr. Zimbal's brief, they have "confessed that which they do

not undertake to refute." ***Charolais Breeding Ranches Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W. 2d 493 (1979).

CONCLUSION

The court told Mr. Zimbal it would not consider his request for "recusal" until he consulted with his attorney, and Mr. Zimbal did not have an attorney until the statutory time period for requesting substitution had expired. His attorney made a timely request for substitution. All three applicable legal analyses of the facts of this case lead to the same conclusion: the circuit court erred when it denied Mr. Zimbal's motion for substitution of judge.

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 29th day of January, 2016

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 1,980 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 29th day of January, 2016.

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 29th day of January, 2016.

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