STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2015AP001292-CR &
2015AP001293-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction Entered in
the Brown County Circuit Court, the
Honorable William M. Atkinson, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Mr. Zimbal Made Timely Oral and Written Requests for Substitution.

At his earliest opportunity and prior to the appointment of new trial counsel, Mr. Zimbal made an oral request for substitution. (174:5; App. 122). When the court denied that request "at this time" because new trial counsel had not yet been appointed, Mr. Zimbal took a reasonable and logical step and alerted the court of appeals in writing about the circuit court's decision and his ultimate goal to remove Judge Atkinson from his case. (190; App. 123-126). When the court of appeals responded to Mr. Zimbal's "letter regarding substitution or recusal of Judge Atkinson" and suggested that he "consult with your trial counsel about how to proceed," Mr. Zimbal complied. (100; App. 129). He awaited the appointment of counsel, the delay of which was completely outside of his control, and filed a formal substitution request through counsel. (105; App. 136). Again, as it did in the court of appeals, the state argues that Mr. Zimbal was actually represented when he made timely requests for Judge Atkinson to "recuse" himself. The state's argument is contradicted by a simple, reasonable, and full review of the record.

A. Mr. Zimbal was not represented by counsel when he made timely oral and written requests for substitution.

Neither Attorney Cano nor Attorney Hirsch represented or could have competently represented Mr. Zimbal with respect to his substitution requests. Attorney Cano appeared in the courtroom during two pre-remittitur status hearings solely in an administrative capacity. He did

not represent Mr. Zimbal.[1] (173, 174; App. 112-122). At the October 7, 2013, hearing Attorney Cano made it clear that he was not and would not be representing Mr. Zimbal at trial and that only after Mr. Zimbal was transported back to Brown County from prison would the State Public Defender's Office "discuss with him the appointment of attorney." (174:2; App. 119). The court acknowledged Attorney Cano was not representing Mr. Zimbal, stating: "So, should I just put it on for status so we can get the attorney lined up?" Attorney Cano affirmed the court's plan. (174:3; App. 120).

It was at the same hearing and after the status hearing was scheduled for a later date, that Mr. Zimbal, on his own behalf, made motions to modify his bond and for substitution. Mr. Zimbal stated: "Is that part of the hearing done now?" When the court confirmed that the status and scheduling portion of the hearing was complete, Mr. Zimbal stated: "I make a motion *myself* for a signature bond to be issued, please." (174:4; App. 121) (emphasis added). The court denied Mr. Zimbal's bond modification motion and then Mr. Zimbal made his oral substitution request: "I'm also asking that you recuse yourself because there is no way you can be impartial and/or bias (sic)." The court denied Mr. Zimbal's request "at this time" to allow Mr. Zimbal to consult with his yet-to-be appointed trial attorney, whom the court and the parties assumed would be appointed in time for the upcoming October 15, 2013, status hearing. Attorney Cano said nothing on Mr. Zimbal's behalf with respect to either motion. (174:4-5; App. 121-122).

Immediately after Judge Atkinson denied Mr. Zimbal's oral substitution request, Mr. Zimbal wrote to the court of appeals regarding Judge Atkinson's decision. (190; App. 123-126). In that filing, Mr. Zimbal expressed his frustration with

[1] *See* Brief-in-chief at 11, n.3.

Judge Atkinson's decision not to remove himself from the case and reasserted his ultimate goal: "Yes, I want him off my case and feel this is critical to me." (190:4; App. 126).

When the court of appeals responded to Mr. Zimbal's letter "regarding *substitution* or recusal of Judge Atkinson," it suggesting that Mr. Zimbal "consult with *trial counsel* about how to proceed." (100; App. 129) (emphasis added). This letter was filed in the circuit court and sent to Judge Atkinson well within the statutory deadline.

Furthermore, during the October 29, 2013, hearing, at which Mr. Zimbal appeared in person and without counsel, Judge Atkinson again acknowledged Mr. Zimbal was still unrepresented, stating: "I think we've been able to determine there is no one appointed for you at this time." After Mr. Zimbal referenced a letter from Attorney Hirsch that said a "local trial attorney will be appointed for you," the court announced that "the public defender's office is requesting a week because they apparently have not been able to find an attorney to take your case yet." (176:2-3; App. 131-132).

Mr. Zimbal appeared at the next hearing on November 1, 2013, with his newly appointed trial attorney, Ben Hanes. Within 20 days from that date, Mr. Zimbal filed a formal written substitution request through Attorney Hanes. (105; App. 136).

Prior to the appointment of Attorney Hanes, the circuit court acknowledged that Attorney Hirsch would not be representing Mr. Zimbal. (176:2-3; App. 131-132). Indeed, it would make no sense and be contrary to standard procedure and the administrative code for Attorney Hirsch to represent Mr. Zimbal in new trial proceedings. At the time, Attorney Hirsch was an attorney in the appellate division of the State Public Defender's Office in Madison. She was not a trial

attorney and she did not practice routinely in Brown County. Attorney Hirsch was in no position to competently or effectively represent Mr. Zimbal by filing *any* pre-trial motions, including a request for substitution.

Following the state's logic, a defendant's former postconviction or appellate attorney provides ineffective assistance of counsel by not filing a pre-trial motion. Following the same logic, does a trial attorney provide ineffective assistance of counsel by failing to file a timely postconviction motion or notice of appeal? Mr. Zimbal doubts that our trial and appellate courts would welcome such novel ineffective assistance of counsel claims.

During the time between Mr. Zimbal's oral and written substitution requests and the appointment of new trial counsel, the record is clear that Mr. Zimbal was unrepresented with respect to his requests for substitution. For these reasons, there would have been no merit to any argument that Attorney Cano or Attorney Hirsch provided ineffective assistance of counsel to Mr. Zimbal.

B. Mr. Zimbal's oral and written requests for Judge Atkinson to "recuse" himself must be construed as requests for substitution.

The state argues Mr. Zimbal requested recusal, which cannot be interpreted as a request for substitution. To the contrary, this Court very recently held that phrases like "change of judge" and "recusal," especially when used by a defendant acting on his own behalf, should be interpreted as requests for substitution if the defendant's goal to remove the judge from his case is clear. ***State v. Harrison***, 2015 WI 5, ¶26, 360 Wis. 2d 246, 858 N.W.2d 372. That decision simply applied the clear rule regarding liberal construction of the

filings of *pro se* litigants. *See* ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶16, 263 Wis. 2d 55, 667 N.W.2d 1 (stating that it is well settled that *pro se* complaints are to be liberally construed).

Further, the court of appeals, in its response letter to Mr. Zimbal, interpreted his request as one for substitution or recusal. (100; App. 129). Additionally, in its decision in this case, the court of appeals recognized that Mr. Zimbal's oral request could have been construed as a request for substitution (Slip Op. ¶1, n.1; App. 102).

Moreover, a defendant's request for substitution is not converted into a motion for recusal simply because he explains *why* he wants to substitute a judge. Mr. Zimbal may not have used the proper legal terminology but his goal was just as clear as Harrison's: Mr. Zimbal did not want Judge Atkinson on his case.

II. Wisconsin Stat. § 971.20(7) Must Be Applied Reasonably to Guarantee a Defendant's Right to Substitution.

Contrary to the state's "strict adherence" argument, courts have repeatedly refused to strictly adhere to Wis. Stat. § 971.20 if such an application would interfere with a defendant's right to substitution. (*See* Brief-in-chief at 14-19).[2] The state cites to a single court of appeals decision, ***State v. Austin***, 171 Wis. 2d 251, 257, 490 N.W.2d 780

[2] Citing and discussing ***Baldwin v. State***, 62 Wis. 2d 521, 532, 215 N.W. 2d 541 (1974); ***Clark v. State***, 92 Wis. 2d 617, 627, 286 N.W. 2d 344 (1979); ***State ex rel Tessmer v. Circuit Court Branch III***, 123 Wis. 2d 439, 443-44, 367 N.W.2d 235 (Ct. App. 1985); ***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).

(Ct. App. 1992), for its strict adherence argument, but ***Austin*** does not support the state's position.

In fact, ***Austin***, like the ***Baldwin*** line of cases cited by Mr. Zimbal, centers on protecting a defendant's right to substitution. The ***Austin*** court held that a defendant does not implicitly waive or forfeit the right to substitution unless Wis. Stat. § 971.20(11) is strictly adhered to. 171 Wis. 2d at 257.

Wisconsin Stats. § 971.20(11) states:

> **(11) Return of Action to Substituted Judge**. Upon the filing of an agreement signed by the defendant or the defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

In ***Austin***, the defendant substituted a judge and later did not object when the same judge sentenced him after revocation of probation. 171 Wis. 2d at 253-54. The state argued that the defendant's failure to object to the judge's participation at sentencing constituted an implied waiver of the right to substitution. ***Id***. at 257. The court disagreed, finding that, "[o]nce a judge has been substituted out of a case, he may not preside over any subsequent proceedings" and that to allow him to do so would "effectively nullify[] the defendant's right to substitute a judge." ***Id***. at 256 (quoting ***State v. Smith***, 106 Wis. 2d 17, 20-21, 315 N.W.2d 343 (1982).

It is within this context that the ***Austin*** court went on to explain that Wis. Stat. § 971.20(11) specifically delineates the requirements to be followed for a transfer back to the substituted judge. ***Id***. at 257. The court stated:

> Moreover, deviation from the requirements would allow for substantial problems that are prevented by strict adherence to the statute. First, to find implied waiver in circumstances like these would be to condone carelessness among lawyers and courts. It is the responsibility of both lawyers and courts to check on previous substitutions as a matter of course. Second, to allow an implied waiver would serve to unfairly penalize less informed defendants who, because they are pro se, or because they are represented by successor or forgetful counsel, may not remember the substitution. …
>
> Third, to allow an implied waiver would be to allow a new form of "forum shopping."

Id. In other words, ***Austin***, like the cases cited by Mr. Zimbal,[3] are all about protecting the defendant's right to substitution. The parallel language between these cases is striking and only further supports Mr. Zimbal's position that Wis. Stat. § 971.20(7) must be reasonably construed to protect a defendant's right to substitution.

The ***Baldwin*** court reasonably interpreted a statutory provision regarding the filing deadline of a substitution request because "[t]his interpretation witnesses and gives effect to the predominant intention of the legislature expressed in this section to 'afford a substitution of a new judge assigned to the trial of that case" and because "[a] strict construction makes it impossible to obtain the objective of this section and would frustrate the objective of this statute." 62 Wis. 2d at 530.

Similarly, the ***Austin*** court strictly adhered to the statutory provision regarding not returning a case to a

[3] *See supra* n.1.

substituted judge so as to not "vitiate the substitution of judge statute by effectively nullifying the defendant's right to substitute a judge." 171 Wis. 2d at 256.

Thus, the state misconstrues ***Austin*** and the ***Baldwin*** line of cases when it argues that strict adherence to Wis. Stat. § 971.20 is required even when it means a defendant unreasonably loses his right to substitution. (*See* State's br. at 9). In fact, to preserve the underlying right to a fair trial, the "language of sec. 971.20, Stats., must apply as reasonably as possible to all cases to attain its object." ***Baldwin***, 62 Wis. 2d at 531-32. In this case, a reasonable application of Wis. Stat. § 971.20(7) protects Mr. Zimbal's right to substitution.

III. Equitable Tolling Applies to This Case Because the State Public Defender's Office's Delayed Appointment of New Trial Counsel Made It Impossible for Mr. Zimbal to Timely Comply With the Circuit Court's October 7 Order.

As argued above, Mr. Zimbal was not represented by counsel with respect to his requests for substitution until Attorney Hanes was appointed on November 1, 2013. (*Contra* State's br. at 13-16). As applied to this case, the equitable tolling rule would toll the statutory deadline from October 7, 2013, through November 1, 2013, and therefore deem timely Mr. Zimbal's November 18, formal request for substitution.

The equitable tolling rule has been applied when circumstances beyond the control of the defendant resulted in untimely court filings. *See* ***State ex rel. Walker v. McCaughtry***, 2001 WI App 110, 244 Wis. 2d 177, 629 N.W. 2d 17; ***State ex rel. Nichols v. Litscher***, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W. 2d 292.

The equitable tolling rule is applicable here for two reasons: First, the circuit court denied Mr. Zimbal's oral request for substitution explicitly because he was not yet represented by new trial counsel and instructed him to wait to raise the issue again until after he had a trial attorney appointed. (174:5; App. 122).[4] Second, Mr. Zimbal had absolutely no control over the State Public Defender's Office's delayed appointment of new trial counsel. Thus, circumstances completely beyond Mr. Zimbal's control prevented him from filing a timely substitution request that would have complied with the circuit court's October 7 order.

The state's argument against application of the equitable tolling rule ignores the facts of this case and the logical consequences of such a narrow reading of the rule. The state's rule would encourage or require defendants, who are entitled to or are awaiting the appointment of counsel, to disregard circuit court orders and file successive *pro se* motions. As Mr. Zimbal previously argued,[5] neither the courts, the state, nor the criminal defense bar would welcome such a rule.

Rather, when combined with the State Public Defender's Office's delayed appointment of counsel, the circuit court's October 7 ruling necessitates the equitable tolling of the statutory deadline in this case.

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[4] Not only did the trial court instruct him to wait, but the court of appeals also suggested that he consult with trial counsel about how to proceed. (100; App. 129).

[5] *See* Brief-in-chief at 13.

CONCLUSION

Mr. Zimbal timely, clearly, and consistently asserted his right to substitution. Regardless of the applicable legal theory, the circuit court erred by not granting Mr. Zimbal's request for substitution. The state's arguments to the contrary misconstrue the facts and the law and would create problems that do not yet exist.

Dated this 16th day of November, 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 2,513 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:

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