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STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2015AP001292 & 2015AP001293

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

AMICUS CURIAE BRIEF OF
WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

Neither Mr. Zimbal's Former SPD-Appointed Appellate Attorney nor the Local Trial Office Attorney Manager Responsible for Appointing a SPD Trial-level Attorney for Mr. Zimbal's Retrial were Responsible for Filing Mr. Zimbal's Judicial Substitution Motion After Remittitur Returned Mr. Zimbal's Case to the Circuit Court.

Mr. Zimbal's SPD-appointed appellate attorney, Eileen Hirsch, successfully litigated Mr. Zimbal's appeal, with the court of appeals granting him a new trial. Attorney Hirsch's appellate representation ended when, on the morning of the first business day after the petition for review deadline lapsed, she informed Mr. Zimbal that the state did not file a petition and he had a right to be retried before a different judge. (190). The Attorney General now argues Attorney Hirsch, or SPD Attorney Manager, Jeffrey Cano, whom Attorney Hirsch contacted to secure trial representation for Mr. Zimbal, were responsible for filing a substitution motion for a trial defendant neither was appointed to represent. (AG's brief pp. 14-15). The Attorney General is wrong.

On September 4, 2013, the Court of Appeals, Dist. III, issued a decision granting Mr. Zimbal a new trial. As was his right pursuant to Wis. Stat. § 971.20(7), at a status conference on October 7 before the Hon. William Atkinson, Mr. Zimbal requested a different judge for his retrial. (174:5). Judge Atkinson denied the request, telling Mr. Zimbal his yet-to-be-appointed trial attorney could take it up at the next status hearing on October 15, or if he "want[ed] it addressed beforehand" he could "send it by letter." Mr. Zimbal mailed a

letter to the court of record that same day (remittitur had not yet issued). (190). When the state failed to produce Mr. Zimbal for the October 15 hearing, and the SPD had not yet appointed an attorney, Judge Atkinson set the matter over to October 29, a date 21 days after remittitur issued on October 8. Mr. Zimbal was still without counsel at the October 29 hearing. (176:1-2).

Mr. Zimbal first appeared with an SPD-appointed trial attorney on November 1, 2013. On November 18, 2013, Mr. Zimbal's newly-appointed trial attorney filed a formalized substitution motion, which Mr. Zimbal previously had on his own attempted to raise orally in court and by letter. Because Wis. Stat. § 971.20(7), states that a substitution motion following an appeal "may be filed within 20 days after the filing of the remittitur by the appellate court," Judge Atkinson denied Mr. Zimbal's motion as untimely. (105; 106). Although Judge Atkinson at the October 7 hearing had told Mr. Zimbal he needed to "let [his] attorney do the research on that issue" (174:5), the court of appeals affirmed stating Judge Atkinson's directive that he needed to wait for an attorney "did not prevent Zimbal from timely filing a written request;" presumably on his own as an attorney was not appointed for Mr. Zimbal until more than 20 days after remittitur. (Slip Op. ¶ 8).

In this court, Mr. Zimbal's SPD-appointed appellate attorneys advance three alternative arguments as to why the circuit court erred in not granting Mr. Zimbal's substitution motion. First, Mr. Zimbal's oral and written requests for a different judge made before the 20-day deadline lapsed and before an attorney was appointed rendered Mr. Zimbal's substitution motion timely. Second, the statute should be reasonably construed to give effect to legislative intent, which on the facts here mitigate in favor of granting Mr. Zimbal his

right to substitution after the court of appeals granted him a new trial. And third, the court should apply the equitable tolling rule because a government-created obstacle beyond Mr. Zimbal's control caused the belated formal substitution filing. In this case the government-created obstacle was delay by the Office of the State Public Defender in appointing the trial-level attorney to which Mr. Zimbal was entitled and which the trial judge told him he needed before the court would rule on substitution.

Among the arguments the Attorney General now advances is that Mr. Zimbal's former appellate attorney, Eileen Hirsch, or SPD Trial Division Attorney Manager Jeffrey Cano, who was responsible for appointing a trial-level attorney, were somehow responsible for timely filing a substitution motion. Specifically, the Attorney General argues "[t]he record demonstrates that Attorney Jeffrey Cano appeared on Zimbal's behalf at two hearings" and "[t]he record also indicates that Zimbal was consulting with Attorney Hirsch during that time." (AG's brief, pp 4-5, n. 5). The Attorney General then posits "[w]hile the scope of their representation may have been limited, the suggestion that neither served as Zimbal's counsel in any way makes no sense." The Attorney General then makes the claim "[h]ad Zimbal informed Attorney Cano or Attorney Hirsch that he wanted to request substitution of judge it would have been incumbent on them to file the simple, suggested form. In the alternative, their failure to act on Zimbal's desire to substitute judges would have constituted ineffective assistance of counsel." (AG's brief, p. 14).

The Attorney General's argument is not grounded in law or fact, and evinces a fundamental misunderstanding of scope of representation in State Public Defender cases. Attorney Hirsch's appellate representation ended when the

state declined to file a petition for review, and when she on the morning of October 7 discharged her responsibility pursuant to SCR 20:1.16(d), “Declining or terminating representation,” to inform Mr. Zimbal of that fact, advise him of his rights and set in motion the appointment of new trial counsel. Attorney Cano was never appointed to Mr. Zimbal’s case in any capacity; he was merely present in court in an administrative capacity at the status hearings for the sole purpose of informing the court the SPD would be appointing a trial-level attorney for Mr. Zimbal.

The Attorney General acknowledges the fact of limited scope representation, but then seems to argue that limited scope somehow means general scope or that any public defender present in court, regardless of purpose, is somehow considered advocate counsel for any SPD client or potential client appearing in the same court.

The Office of the State Public Defender is a statutory creation and its attorneys and employees actions are governed by statute and administrative code rules. *See* Wis. Stat. Ch. 977; Wis. Admin. Code Chs. PD 1-8. The SPD Board appoints the State Public Defender and promulgates rules. Wis. Stat. § 977.02. The State Public Defender is responsible for appointing counsel in accordance with the policies of the board, and may delegate legal representation and designate persons to determine eligibility and appoint counsel. Wis. Stat. § 977.05(4)(g), (gm), and (5)(a) &(b). The SPD agency has an Administrative Services Division, Trial Division, Appellate Division and an Assigned Counsel Division. (App. 101). Responsibility for determining client eligibility and appointing counsel in SPD staff and private bar cases is delegated to attorney managers and representatives in 36 Trial Division offices and two Appellate Division offices.

By rule attorneys who seek to represent public defender clients must meet certification criteria for designated case types. Wis. Admin. Code § PD 1.035 & 1.04. In part because the specialized knowledge and skill sets required to provide effective representation are different, certification and hiring requirements for Trial Division cases [§ PD 1.04 (1) through (12)] and Appellate Division cases [§ PD 1.04(13)] are separate and distinct. Consistent with statutory, administrative code and internal operating procedure rules SPD trial-level cases are appointed to SPD Trial Division staff attorneys or trial-certified private bar attorneys. SPD appellate cases are appointed to Appellate Division staff attorneys or appellate-certified private bar attorneys. When the SPD appoints an attorney, the SPD discharges its statutory obligation to “inform the referring judge, court or agency of the name and address of the specific attorney who has been assigned the case” by issuing an order appointing counsel. Wis. Stat. §§ 977.05(g) & (gm).

To the point here, within a single prosecution, by rule “[a]ppellate representation shall be considered a separate case and reassigned under s. PD 2.03.” Wis. Admin. Code § PD 2.11(1). In most cases a SPD Trial Division client is charged a fee for representation. Wis. Admin. Code §§ PD 6.01 & 6.02. A separate fee is imposed for an appeal case. *Id.* Financial eligibility criteria are also different for SPD trial and appellate cases and in many cases eligibility must be re-determined when a case moves from one division to the other. Wis. Stat. § 977.07(1)(c); Wis. Admin. Code Ch. PD 3; Wis. Admin. Code § PD 6.04.

The SPD Appellate Division appointed Madison Appellate Assistant State Public Defender Eileen Hirsch to represent Mr. Zimbal on appeal from the judgment entered on August 1, 2011. The scope of the SPD’s order appointing

counsel was for postconviction and appellate proceedings. Attorney Hirsch obtained relief for Mr. Zimbal in the court of appeals, which issued decision on September 4, 2013. Mr. Zimbal's appeal case ended when the state did not file a petition for review by the 5:00 p.m. Friday, October 4, 2013, deadline. Attorney Hirsch completed her representation when she phoned Mr. Zimbal on the morning of Monday, October 7, 2013, to inform him his appeal was done, advise him of his rights and let him know the local SPD Trial Division office would appoint a SPD trial-level attorney for his retrial.

While the case was still pending awaiting the state's decision on filing a petition for review, Attorney Hirsch contacted SPD Trial Division Attorney Manager Jeffrey Cano to secure a trial-level attorney appointment for Mr. Zimbal. (174:2). At an October 4, 2013, status hearing, Attorney Cano informed the court that because the appeal case was not yet finished until the petition deadline lapsed, Mr. Zimbal was still "represented by Attorney Hirsch from our appellate office in this matter." (173:2). Judge Atkinson then put the matter over until Monday, October 7. When the court reconvened on October 7, Mr. Zimbal's appeal case and Attorney Hirsch's appellate representation were done. Attorney Cano was present and let the court know that when the government returned Mr. Zimbal to the county the SPD would "discuss with him the appointment of attorney." (174:2)

Neither Attorney Hirsch nor Attorney Cano were appointed or were acting as advocate counsel for Mr. Zimbal during the October 7, 2013, status hearing, or at any point thereafter. Attorney Hirsch's representation was done and Attorney Cano only ever appeared in this matter in an administrative role as the State Public Defender's designee

for appointing counsel, something SPD Attorney Managers do routinely. The SPD Green Bay trial office had to re-determine Mr. Zimbal's financial eligibility for trial representation. The office also apparently had difficulty securing representation for Mr. Zimbal, as sometimes occurs. Due to extremely heavy caseloads and increasingly high turnover, SPD staff attorneys are not always available for a case appointment. In this same vein, SPD appointment staff cannot always easily find a private bar attorney willing to take a case for which SPD staff is not available or able to take. There are large parts of the state with very few or no attorneys willing to take cases at the statutory \$40 rate of pay. Wis. Stat. § 977.08(4m)(c). An order appointing Attorney Ben Hanes was not issued until sometime on or after October 29, 2013.

The Attorney General's argument notwithstanding, although Attorney Hirsch accurately advised Mr. Zimbal of his right to seek substitution, and Attorney Cano was present when Mr. Zimbal attempted to secure that right for himself, it was not "incumbent on [Attorneys Hirsch or Cano] to file the simple, suggested form" for recusal and their "failure to act" did not "constitute[] ineffective assistance of counsel." (AG's brief p. 14). The Attorney General acknowledges the concept of limited scope representation and concedes the scope of Attorney Hirsch's representation and Attorney Cano's role "may have been limited." But the Attorney General then argues it "makes no sense" to conclude Attorneys Hirsch and Cano would not be obligated to file a motion on behalf of a defendant neither was appointed at that time to represent. (AG's brief p. 14)

The Attorney General's argument is without support. The responsibilities or obligations of an attorney to a former client do not encompass filing motions in subsequent

proceedings for which the attorney is not appointed. The same is true for a SPD Attorney Manager who appears in connection with a case in an administrative role. Decisions regarding Mr. Zimbal's pending trial were properly resolved by Mr. Zimbal in consultation with his trial attorney, when such attorney was appointed. Because neither Attorney Hirsch nor Attorney Cano were appointed in that capacity, neither was in a position to formalize and file the substitution motion Mr. Zimbal attempted to file on his own while awaiting appointment of new trial counsel.

Citing *State v. Austin*, 171 Wis. 2d 251, 257, 490 N.W. 2d 780 (Ct. App. 1992), the Attorney General argues that strict adherence to the 20-day rule for substitution is necessary to avoid "substantial problems." While there may be some validity to that argument for the scores of thousands of new criminal trial cases that occur annually, it is not true for substitution pursuant to Wis. Stat. § 971.20(7), because the number of cases in which an appellate court grants a new trial is very small. (AG's brief pp. 8-9).

The Attorney General acknowledges that even for new trial cases, the "strict adherence" rule is relaxed in situations where a government-created obstacle interferes with a defendant's opportunity to timely file for substitution. See *State ex rel. Tinti v. Circuit Court for Waukesha Cnty., Branch 2*, 159 Wis. 2d 783, 788, 464 N.W.2d 853 (Ct. App. 1990). (AG's brief, pp. 9-10). That is exactly what happened here. When Mr. Zimbal attempted to exercise his right to substitution Judge Atkinson told him he needed to wait to consult with his not yet appointed trial attorney. Mr. Zimbal had no control over when that appointment would occur and the government agency responsible did not make the appointment until after the 20-day substitution deadline.

Under these circumstances Mr. Zimbal's attempts to file a substitution request while awaiting appointment of counsel were timely or should render timely the formalized motion filed after the deadline. Or, the strict adherence rule should be relaxed because a government-created obstacle for all practical purposes prevented Mr. Zimbal from timely filing his substitution motion.

CONCLUSION

For the above-stated reasons, the State Public Defender requests that this court reverse the court of appeals and order a new trial.

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 2,387 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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