STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

---

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

JOE BONDS TURNEY,

Defendant-Appellant

Case numbers:
2015AP001651-CR
(L.C. 2013CF003941)

2015AP001652-CR
(L.C. 2013CF004535)

---

# REPLY BRIEF OF JOE BONDS TURNEY, DEFENDANT-APPELLANT

---

Consolidated appeals from judgments of conviction and a denial of a post-conviction motion, the Honorable Rebecca F. Dallett, Milwaukee County Circuit Court Judge, presiding

---

Submitted by:
Dianne M. Erickson,
Attorney for J. B. Turney

SBN: 1009156
P.O. Address:
1429 North Prospect Avenue, Suite 211
Milwaukee, Wisconsin 53202
(414) 278-7776; email address: wasieerick@milwpc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## STATEMENT ON PUBLICATION

The government did not find a precise case on the substitution question either. (Response, pp. 15-17). This case would establish a new rule of law. Wis. Stat. §809.23(1)(a)1.

## ARGUMENT

### I. The post-conviction motion was filed with the record.

According to the assembled record document for 2015AP001651CR, page 2, the post-conviction motion is document number 30, 12 pages, entitled "Motion to Hold Hearing to Determine Whether Trial Counsel was Ineffective in Representing Mr. Turney." In footnote 3, page 4, of the government's response, the government thought the document is not in either record, but it is.

### II. The cases should not have been joined for trial.

The government states there are three criteria for joining crimes. (Response, p. 11). Wis. Stat. §971.12(1), in which many phrases are connected by the word "or," could indeed be read the government's way, or it could be

read other ways. However, this is the way the Wisconsin Supreme Court read the statute in Francis v. State, 86 Wis. 2d 554, 556-558, 273 N.W. 2d 310 (1979):

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are [1] of the same or similar character or [2] are based on the same act or transaction or [3] on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

Wis. Stat. §971.12(1). In Francis v. State, 86 Wis. 2d at 558, 273 N.W. 2d at ___, the Court stated:

> Neither party contends that the crimes charged in the first two counts are of [1] "the same or similar character" as that charged in the third count or that the first two counts are based on [2] "the same act or transaction" as the third count. The issue is whether the crimes charged in counts 1 and 2 can be joined with that charged in count 3 because all the crimes charged are [3] based on two or more acts or transactions "connected together or constituting parts of a common scheme of plan"

as that phrase is used in sec. 971.12(1).

So according to the Court, the phrase "two or more acts or transactions connected together" belongs to the third criteria, not the second. (See Response, p. 11).

Mr. Turney is not conceding anything. (Government response, p. 11). The government is joining phrases together in a different way. On page 23, Mr. Turney's brief points out that the crimes are not the same act or transaction and that the judge never said they were. (44(51)/47(52): 4-12). Under the second criteria outlined in Francis v. State, 86 Wis. 2d at 558, 273 N.W. 2d at ___, there can be no serious contention that these crimes are the same act or transaction.

The Court reads the phrases "connected together" or "constituting parts of a common scheme or plan" as though they are simply two different ways of saying the same thing, which all means that "the crimes charged have a common factor or factors of substantial factual importance, *e.g.* time, place or *modus operandi* so that the evidence of each crime is relevant to establish a

common scheme or plan that tends to establish the identity of the perpetrator." Francis v. State, 86 Wis. 2d at 560-561, 273 N.W. 2d at ___. The trial court's analysis of Mr. Turney's *modus operandi* is that basically Mr. Turney is a bully, who shoots at others to get his own way. (44(51)/47(52): 8-9). This is simply impermissible character evidence, showing that Mr. Turney acted in conformity with his bullying ways. Wis. Stat. §904.04(1).

It is true, as the government states, that trial evidence showed that "LW" or "Lucy" tried to reach Mr. Turney at "LB's" or "Lillie's" house. (Response, p. 14). However, the significance of this fact is to present that Turney knew Lucy was looking for him, a fact that can be established without adding: "by the way at that very house, Mr. Turney fired his gun at his girlfriend!" (48(51)/50(52): 74-79, 84). It is also true that trial evidence showed that someone driving Lucy's car engineered Mr. Turney's escape from the domestic violence incident. (Response, pp. 14-15). But the state could likewise tell this story without adding, "And guess

what? Lucy did not even want Mr. Turney to have that car, and he did terrible things to try to keep it!"

Joinder issues pertain to identity. Francis v. State, 86 Wis. 2d at 560-561, 273 N.W. 2d at ___. One can see this in the case of serial crimes where one trial might resolve the issue of whether the defendant is the man showing up at a bank every Tuesday and demanding five thousand dollars each time. Either the defendant is that person, or he is not. Or a crime might be proved in showing how the defendant uses the same scheme to defraud family, friends, and strangers alike. Joining cases does not work when people who know the defendant call police to report crimes that stem from unrelated incidents. The defense must convince the jury that "lightning strikes twice," and by pure coincidence police are responding to multiple false complaints about the defendant's behavior. Conviction is highly likely.

This joinder was prejudicial. Francis v. State, 86 Wis. 2d at 561, 273 N.W. 2d at ___. These two cases were joined due to the common thread of rage and violence, characterized by a *lack* of planning, where

similarity among impulsive acts is purely coincidental. Such acts are the opposite of showing *modus operandi* and joining them for trial simply shows a defendant's violent character, which is improper.

## III. Judge Dallet should have allowed Mr. Turney to substitute her.

The government cites Wis. Stat. §971.20(6) to make an analogy between consolidation of defendants and consolidation of cases. Wis. Stat. §971.20(6) forbids substituting a judge unless all defendants agree. This law maintains the status when pleasing both defendants is impossible. "[W]hen a codefendant does not join in the substitution request, the defendant cannot obtain a substitution of judge." State ex rel Garibay v. Circuit Ct. for Kenosha County, 2002 WI App 164, ¶10, 256 Wis. 2d 438, 647 N.W. 2d 455. Wis. Stat. §971.20(6) addresses rights versus rights cases and can be distinguished in purpose from consolidation cases involving multiple charges for a single defendant.

The government did not address the concern in Mr. Turney's brief that if a defendant allows a judge to handle a case involving a minor traffic crime, does this mean the defendant is stuck if an extremely serious charge comes along? (Appellant brief, p. 39). Wis. Stat. §971.20(5) states that the defendant may substitute when a new judge is assigned to the trial of an action, which means "all proceedings before a court from the filing of a complaint to final disposition at the trial level." Wis. Stat. §971.20(1). Linking the substitution right to the case eliminates the defendant's need to substitute a judge on a misdemeanor as future insurance if a serious charge comes in.

Since there were no other defendants' interests at stake, as with Wis. Stat. 971.20(6), it is hard to see why Mr. Turney's substitution request, made minutes after hearing that Judge Dallet would now take his second case, drew opposition. (44(51)/47(52): 16-17). Wis. Stat. §971.20 grants criminal defendants the right to substitute a judge without providing a reason. State v. Harrison, 2015 WI 5, ¶39, 360 Wis. 2d 246, 858 N.W. 2d

372. The statute checks the power of the courts and the prosecutor, who have more control over to whom cases are assigned and when they are brought. In Mr. Turney's case, the government's filing placed the consolidation motion before Judge Dallet instead of before Judge Watts. (44(51)/47(52): 2). Defendants' substitution requests should not be needlessly thwarted.

IV. The *Wedgeworth* case does not apply.

Mr. Turney's brief has explained how State v. Wedgeworth, 100 Wis. 2d 514, 302 N. W. 2d 810 (1981), does not apply. (Response, p. 20; Appellant brief, pp. 47-48). In that case, that an address was involved in the half answer is pure coincidence and not an important fact. State v. Wedgeworth, 100 Wis. 2d at 527, 302 N. W. 2d at. Instead, the case states that if the suspect starts to answer and then claps his hand over his mouth, the officer may tell the jury what happened. Otherwise the officer's testimony makes no sense.

Mr. Turney's post-arrest refusal to answer Detective Sullivan's questions suggested lack of

cooperation and evasion, something a jury would think that only a guilty suspect would do. (49(51)/52(52): 44-43).

On pages 48-52, Mr. Turney's appellate brief analyses the prejudice prong necessary to prove ineffective assistance of counsel. (Response, p. 22). In addition, that police found the car registration in Mr. Turney's pocket seems consistent with evidence that somehow he believed he had an interest in that property. (Response p. 21; (51(52): 23). But his evasive answers to police undermine that belief, making it clear to the jury that he was hiding something. That evidence should never have gone in.

## CONCLUSION:

Mr. Turney continues to seek a new trial.

Dated at Milwaukee, Wisconsin, this 8th day of March, 2016.

Respectfully submitted by:

_____

Dianne M. Erickson,
Attorney for Joe Bonds Turney

SBN: 1009156

P.O. Address:

Wasielewski And Erickson
1429 North Prospect Avenue, Suite 211
Milwaukee, Wisconsin 53202
(414) 278-7776
Email address: wasieerick@milwpc.com

## CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §§809.19(8)(b) and (c) for a brief with a proportional serif font. The brief has 1870 words.

/s/ _____
Dianne M. Erickson

## ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this brief is identical to the text of the paper copy.

/s/ _____
Dianne M. Erickson