STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000238-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant.

On Notice of Appeal from a Judgment and an Order
Entered in the Racine County Circuit Court,
the Honorable David W. Paulson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Michael L. Washington was tried *in absentia*, having been removed from the courtroom before voir dire and never returning. Did the court err in finding that Mr. Washington's conduct waived his statutory right to presence despite this court's holding, in ***State v. Dwyer***, that such waiver may be made only *after* the swearing of the jury?

The circuit court held that Mr. Washington waived his right to presence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Washington does not request oral argument. Publication is not warranted as this case requires only the application of established law to particular facts.

STATEMENT OF THE CASE AND FACTS

Mr. Washington was charged with one count of burglary and one count of obstructing an officer (an additional count of attempted burglary was dismissed at the preliminary hearing). (2:1; 63:2-3). He was scheduled to be tried on February 14 and 15, 2012. On a previous trial date, a jury had been chosen, but not sworn, before the trial was adjourned at Mr. Washington's request. (62; 63:6-11). At a subsequent hearing, counsel testified that the adjournment was requested in order to pursue a witness identified by Mr. Washington who, she learned, had died a few days before the adjourned trial. (68:22).

At the commencement of proceedings on February 14, Mr. Washington's counsel informed the court that Mr. Washington (who had previously sought to have her withdraw as counsel) would not discuss trial strategy with her. (65:2-5; App. 102-05). The court addressed Mr. Washington, who indicated that counsel was "not representing" him. (65:3; App. 103). The court, having noted that "we've been down this road so many times, over and over and over" stated that the trial would go forward as scheduled, at which point Mr. Washington interrupted:

> DEFENDANT: I said she's not representing me and we ain't going no trial now, I mean that.
>
> THE COURT: Sir, we will go forward with the trial and if necessary you may have to be removed from the courtroom.
>
> DEFENDANT: I'm gone. She's not representing me.
>
> THE COURT: Well the record and we're still on the record may reflect that Mr. Washington semi was removed and semi left on his own after the last outburst. So we are out of his presence right now. And the real issue that has come up here is one of manipulation. I think Mr. Washington has been trying to manipulate this case in my opinion for a very long period of time. We had selected a jury and prior to that jury being sworn not too long ago some new information was disclosed. The adjournment was granted so that that could be investigated. Since then I believe he has on two or three additional occasions attempted to discharge counsel and I've denied that motion saying we would be going forward. So we're going to have to decide how to proceed here and as I say the concern that I have is that there's no end in sight if we allow this to continue and allow him to continue with this type of manipulation.

(65:3-5; App. 103-05).

The court observed that it lacked equipment to allow Mr. Washington to participate in the trial from outside the room and noted its concern about leaving Mr. Washington unable to participate. (65:5; App. 105). It noted the procedure laid out in ***State v. Divanovic***, which recommended that the defendant be escorted to the courtroom and warned that further disruption would result in his removal, but also expressed concern that Mr. Washington would be "physically combative" if returned to the courtroom. (65:6-9; App. 106-09). The court recited the history of what it termed Mr. Washington's manipulation and inability to cooperate with counsel. (65:11-14; App. 111-14). It then determined that the trial would proceed in Mr. Washington's absence with periodic check-ins to see whether Mr. Washington would join. (65:15-17; App. 115-17).

Mr. Washington's attorney was sent up to speak with him and explain that the trial would proceed without him, and he declined to return. (66:20-21). No further attempts to contact Mr. Washington were made on the first day of trial, which was taken up by voir dire. (66:21-78). Before the proceedings the next day, a deputy and Mr. Washington's attorney each spoke with Mr. Washington, who informed them he would not come to court. (67:2). The court asked Mr. Washington's counsel to tell him that he should contact jail staff if he wished to come down; the record does not reveal whether she did so. (67:2). Midway through the second day, counsel again spoke with Mr. Washington and explained that his opportunity to testify was approaching; Mr. Washington told her that he understood his right to testify and did not want to do so, and did not want to participate in the trial. (67:73). Once again before the verdict was read, Mr. Washington declined to appear in the courtroom. (67:129). Mr. Washington was convicted. (66:135).

Mr. Washington was present at sentencing, but made no statement and instructed counsel not to make a recommendation. (67:11-12). The court sentenced him to a total of ten years of imprisonment, with five years of initial confinement and five of extended supervision. (67:26,32).

Mr. Washington filed a notice of intent to pursue postconviction relief and was appointed postconviction counsel. (33). More than a year later, counsel filed a postconviction motion for a new trial on the ground that Mr. Washington's trial counsel had not provided effective assistance in failing to call a potential alibi witness. (36). Continued delays in the prosecution of the case led this court to order counsel to provide updates on the case and to threaten sanctions against counsel. (Orders of January 6, 2014 and December 3, 2014). Seven months after the filing of the postconviction motion, the circuit court held a hearing and orally denied the motion. (68). The case again languished for more than a year before this court ultimately determined that postconviction counsel should be relieved of her representation of Mr. Washington. (Order of May 7, 2015). Undersigned counsel was appointed and the Wis. Stat. Rule 809.30 deadline was extended. (Order of May 7, 2015).

Undersigned counsel filed a postconviction motion alleging that Mr. Washington's exclusion from his trial violated his statutory right to be present. (47). After a non-evidentiary hearing, the circuit court denied the motion. (69; 48). Mr. Washington appeals. (49).

ARGUMENT

Mr. Washington's Absence from the Entirety of His Jury Trial Violated His Statutory Right to be Present, Requiring a New Trial.

As he did in his postconviction motion, Mr. Washington submits that his absence from trial violated Wis. Stat. § 971.04(3). The construction of a statute is a question of law which this court decides de novo. ***State v. Nord***, 2001 WI App 48, ¶5, 241 Wis. 2d 387, 625 N.W.2d 302. While this court typically defers to the factual findings of a postconviction court, were the postconviction judge did not preside over the trial, this court reviews its factual findings de novo. *See* ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

A criminal defendant has a constitutional right to be present at every stage of trial. ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984). This right may be waived where a defendant is voluntarily absent from the proceedings. ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (1996).

Neither Mr. Washington's postconviction motion nor this appeal is about the constitutional right to presence. They are instead founded in Wis. Stat. § 971.04, which also requires that a criminal defendant be present at trial, including voir dire, the return of the verdict, and the pronouncement of judgment. Sec. 971.04(1)(b), (c), (f) and (g). The statute provides that a trial may continue where a defendant is voluntarily absent, but sets a condition: the defendant must be "present at the beginning of trial," absenting himself

"thereafter, during the progress of the trial or before the verdict of the jury has been returned." Sec. 971.04(3).

State case law holds that the statutory phrase "beginning of trial" means the same thing in this context as in the law of double jeopardy: a trial begins when the jury is sworn. Thus, in ***State v. Miller***, the defendant, who had been in court when the jury was selected and sworn and during the state's opening statement, absconded before testimony could begin. 197 Wis. 2d 518, 519-20, 541 N.W.2d 153 (Ct. App. 1995). He argued in the court of appeals that Wis. Stat. § 971.04 had been violated, but the court held that he had been "present at the beginning of trial" because he was there for the jury's oath. ***Id.*** at 521-22.

In ***State v. Dwyer***, however, the defendant, apparently unhappy about the court's refusal to allow her to obtain a different lawyer, left the courtroom in the middle of jury selection. 181 Wis. 2d 826, 831-32, 512 N.W.2d 233 (Ct. App. 1994). The court continued with voir dire, the swearing of the jury, and the trial, all in the defendant's absence, with the defense being conducted by her counsel. ***Id.*** at 832.

On appeal, this court determined that, because the defendant absented herself prior to the swearing of the jury, the trial had been held in violation of Wis. Stat. § 971.04:

> A defendant in Wisconsin may not be tried *in absentia* without his or her consent, which may be inferred by conduct. Section 971.04 delimits, however, *when* that consent may be inferred by conduct: [when] "the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court." If this statutory

> precondition to inferring waiver by conduct is not present, the trial court may, in the appropriate exercise of discretion, delay the trial until the defendant can be produced or declare a mistrial.

Dwyer, 181 Wis. 2d at 237 (citations omitted). This court remanded for a new trial. ***Id.***

In ***State v. Koopmans***, the supreme court held that the exception found in Wis. Stat. § 971.04(3) provides the *only* exception to the statute's requirement that the defendant be present. 210 Wis. 2d 670, 563 N.W.2d 528 (1997). There, the defendant, who had been present at trial, did not appear at either of two scheduled sentencing hearings. ***Id.*** at 679. Her attorney stipulated that she was a fugitive and that her absence was voluntary. ***Id.*** While the supreme court noted that "the circuit court proceeded carefully and reasonably in attempting to resolve the situation," ***Id.*** at 679-80, it nevertheless determined that Wis. Stat. § 971.04 is mandatory and requires a defendant's presence at sentencing, and therefore remanded for a new sentencing hearing. ***Id.*** at 680. The court also held that the subsection (3) provision for continuing a trial in the defendant's absence "only applies when the defendant is present at the beginning of trial" and cited both ***Dwyer*** and ***Miller*** with approval, noting that "subsection (3) does not apply when a defendant voluntarily absents himself or herself during jury selection and thus before the beginning of trial." ***Id.*** at 678-79.

In this case, Mr. Washington "semi was removed and semi left on his own" before the commencement of jury selection. As stated in ***Dwyer***, ***Miller*** and ***Koopmans***, his absence violated Wis. Stat. § 971.04. The circuit court's effort to follow ***Divanovic*** does not alter this result; as this court there noted, ***Divanovic*** exclusively concerned the constitutional right to presence, not the statute. 200 Wis. 2d at

219. Because the § 971.04(3) conditions for trial *in absentia* were not met, Mr. Washington must receive a new trial.

At the postconviction hearing, the state attempted to distinguish ***Dwyer*** and ***Koopmans*** by noting that the defendants in those cases were absent from the jurisdiction or at least the courthouse, while Mr. Washington was held in the jail during his trial. (69:5-7). This is a distinction without a difference; while confined in the jail Mr. Washington was no more "present" at his trial than if he had been in Denmark. Moreover, the defendant in ***Divanovic*** was also in jail throughout the trial and it is obvious from the opinion that this court considered him to be "absent." 200 Wis. 2d at 220-22.

The state also argued that ***Dwyer*** authorized the court to try Mr. Washington *in absentia* as an exercise of its discretion. (69:7-8). This is not what ***Dwyer*** says; rather, it says that in cases (like this one) where a defendant's absence cannot constitute waiver under the statute, "the trial court may, in the appropriate exercise of its discretion, *delay the trial until the defendant can be produced or declare a mistrial*." 181 Wis. 2d at 237 (emphasis added; citation omitted). Obviously, neither of these routes was the one taken by the trial court; it instead held the trial without Mr. Washington, contrary to the statute (and to ***Dwyer***).

The postconviction court gave two reasons for denying Mr. Washington's motion. First, it noted the trial court's description of Mr. Washington's "lengthy history of delay" and efforts "to manipulate and frustrate the proceedings," and also that Mr. Washington was approached at various times during the proceedings to see whether he wished to participate. (69:13, 17; App. 122). It added:

> So in this case the record is clear that the Defendant was disruptive to the extent that he chose to not be present in the courtroom; that he refused—secondly, that he refused to leave his cell to attend court; thirdly, that he refused efforts of his attorney to convince him to attend the proceedings; and fourthly, he refused open invitations and opportunities to attend the court at any time during the proceedings.

(69:16-17; App. 125-26).

On the strength of these facts, the court concluded that Mr. Washington's absence from the trial was "voluntary." As the court put it, "[t]here was nothing in the record that indicates anyone was refusing to have Mr. Washington participate in these proceedings except for Mr. Washington himself." (69:18; App. 127).

The first problem with this reasoning is that what the court said of Mr. Washington is equally true of the defendants in ***Haynes***, 118 Wis. 2d at 25 (no suggestion "that his absence from his trial was the result of anyone's insistence but his own"), ***Dwyer***, 181 Wis. 2d at 832 (defendant did not return to court after request for a new lawyer was denied), and ***Koopmans*** (defendant convicted at trial fled the jurisdiction before sentencing). The law on this point is plain: the fact that a defendant chooses not to appear in court is not enough to constitute waiver of the statutory right to presence. *See also* ***State v. Soto***, 2012 WI 93, ¶41 n.41, 343 Wis. 2d 43, 817 N.W.2d 848 (defendant's absence alone does not sufficiently demonstrate waiver of the right to presence).

The more serious problem with the court's line of thinking is the holding of ***Dwyer***: that even if Mr. Washington's conduct could be viewed as consent to proceed without him, such consent is invalid unless he was present at the beginning of trial—that is, when the jury was

sworn. 181 Wis. 2d at 837. He was not, and so under ***Dwyer***, his conduct, no matter how voluntary, cannot waive his right to presence.

The circuit court's second justification for denying Mr. Washington's motion was essentially a policy reason: if Mr. Washington would not cooperate with the trial, either he would have had to be restrained in front of the jury, resulting in prejudice to him, or the trial would have had to be continued indefinitely. (69:16-18; App. 125-27).

This line of reasoning likewise has two flaws: first, unlike the decision to hold a trial *in absentia*, the decision to restrain a defendant lies within the discretion of the trial court. ***State v. Grinder***, 190 Wis. 2d 541, 550-51, 527 N.W.2d 326 (1995). Had the trial court elected to proceed with trial by restraining Mr. Washington in the courtroom, so long as it made an adequate record of the reasons for doing so, Mr. Washington would not have had any ground to complain, regardless of any prejudice to him. So, contrary to the circuit court's conclusion, there was a viable alternative to trying Mr. Washington in his absence.

Second, of course, policy reasons are not sufficient to overcome binding case law. Pursuant to ***Dwyer*** and the other cases discussed above, Mr. Washington did not waive his statutory right to presence; those cases require that he receive a new trial.

CONCLUSION

For the foregoing reasons, Mr. Washington respectfully requests that this court vacate his convictions and sentences and remand with directions that he receive a new trial.

Dated this 19th day of April, 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 2,691 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 19th day of April, 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 one or more initials or other appropriate pseudonym or designation 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.

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