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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP238-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant-Petitioner.

On review of a Decision of the Court of Appeals, District II, Affirming a Judgment and Order Entered in the Racine County Circuit Court, the Honorable David W. Paulson, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> Michael L. Washington was tried *in absentia*—he was removed from the courtroom before voir dire and never returned. Did the court err in finding that Mr. Washington's conduct waived his statutory right to presence despite Wis. Stat. § 971.04(3), which permits such waiver only after trial has begun?

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

The court of appeals affirmed the circuit court's conclusion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases accepted by this court.

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 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. 113-16). The court addressed Mr. Washington, who indicated that counsel was "not representing" him. (65:3; App. 114). 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. 114-16).

The court observed that it lacked equipment to allow Mr. Washington to take part in the trial from outside the room and expressed concern about leaving him unable to participate. (65:5; App. 116). It noted the procedure laid out in ***State v. Divanovic***, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996), which recommended that a disruptive defendant be escorted to the courtroom and warned that further outbursts 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. 117-20). The court recited the history of what it termed Mr. Washington's manipulation and inability to cooperate with counsel. (65:11-14; App. 122-25). It then determined the trial would proceed in Mr. Washington's absence with periodic check-ins to see whether Mr. Washington would join. (65:15-17; App. 126-28).

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 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). That counsel filed a postconviction motion, which was denied; however a series of delays led the court of appeals to relieve Mr. Washington's original counsel of her representation and reinstate his postconviction deadline. (Orders of January 6, 2014, December 3, 2014, and May 7, 2015).

Undersigned counsel was appointed and 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; App. 129-39).

Mr. Washington appealed, (49), arguing as he had in the circuit court that a defendant cannot by absenting himself waive the statutory right to presence until after the jury has been sworn. ***State v. Dwyer***, 181 Wis. 2d 826, 837, 512 N.W.2d 233 (Ct. App. 1994). The court of appeals affirmed Mr. Washington's conviction in a published opinion. ***State v. Washington***, 2017 WI App 6, 373 Wis. 2d 214, 890 N.W.2d 592; App. 101-111. It held Mr. Washington had "made an express, affirmative, intentional choice" to be absent, thus waiving his right to be present. ***Id.***, ¶18, App. 109. It distinguished ***Dwyer*** and other cases by asserting that the issue in those cases had been forfeiture, rather than waiver. ***Id***.

This court granted Mr. Washington's petition for review.

ARGUMENT

Mr. Washington's trial *in absentia* in violated Wis. Stat. § 971.04, and his conviction must be reversed.

A. Introduction and standard of review.

Michael Washington was removed from the courtroom before his trial began and was not returned until he was sentenced. He never saw the jury that convicted him, and the jury never saw him.

Wisconsin Stat. § 971.04(3) does not permit trials in absentia, with one exception: once trial has commenced, a defendant cannot derail it by absenting himself: in that situation, the trial is to continue.

Mr. Washington was not tried in accord with this statute. He was not "present at the beginning of the trial," which is a necessary condition for the single statutory exception to apply. The state has never disputed that it violated the statute in trying Mr. Washington in this way. Instead, the state claims, and the courts below found, that Mr. Washington "waived" his statutory right to be present.

This position is contrary to the statute itself. As this court and the court of appeals have explained, the *statute* sets the conditions under which a defendant's absence from court may be deemed a waiver. The history of the statute shows that these conditions were deliberately chosen, and they were not met here. As such, Mr. Washington was unlawfully tried *in absentia*, and his conviction must be reversed.

The construction of Wis. Stat. § 971.04(3) is a question of law 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, where, as here, 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).

B. Mr. Washington's absence from trial did not meet the Wis. Stat. § 971.04(3) conditions on waiver by conduct.

As noted above, Wis. Stat. § 971.04(3)[1] provides one exception to the rule that a defendant "shall be present" both "[d]uring voir dire" and "[a]t trial": when he or she "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." A trial "begins" when the jury is sworn. ***State v. Koopmans***, 210 Wis. 2d 670, 678-79, 563 N.W.2d 528; ***State v. Dwyer***, 181 Wis. 2d 826, 831, 836 512 N.W.2d 233 (1994).

This exception has not always been in the law. The predecessor statute, Wis. Stat. § 957.07 (1967), provided simply that "[a] defendant accused of a felony shall be personally present during the trial." By way of Wis. L. 1969, ch. 255, § 63, the legislature put the statute in substantially its current form. That legislative act contained notes from the Judicial Council, which had drafted the law. Regarding the new exception, the notes say it is "designed to prevent a defendant from stopping a trial which has commenced by

[1] This appeal concerns only Mr. Washington's statutory, rather than his constitutional, right to be present.

absenting himself." (App. 141). This note cites to the Florida criminal procedure rules, which at the time contained essentially identical language.[2]

The bill's notes, that is, confirm the plain language of the statute: the statutory exception to the general requirement of a defendant's presence applies only where a defendant departs after the trial "has commenced."

The plain language of the statute, as bolstered by this legislative history, would suffice to show that Mr. Washington, who was escorted from the courtroom before trial (and indeed before voir dire) was tried contrary to statute. It is nevertheless worth noting that the statute's rule is a sensible one—one that reasonably balances the protection of a defendant's constitutional rights against the need for efficient administration of justice—and is of long standing. This was explained by the Supreme Court in ***Crosby v. U.S.***, 506 U.S. 255 (1993), which interpreted the very similar rule established and followed by the federal courts.

In that case, the defendant, who had been notified of the date of his trial, cleaned out his house and apparently absconded (he had been living in Minnesota and was arrested six months after the trial in Florida). ***Id.*** at 256-57. The trial went on without him and he was convicted. The Supreme Court reversed and ordered a new trial, concluding that the trial had proceeded in violation of Rule 43 of the Federal Rules of Criminal Procedure. ***Id.*** at 262.

That rule required a defendant's presence at trial but provided an exception for a defendant "voluntarily absent

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[2]*See* Fla. CrPR 1.180(b) at p. 143 (1969), *available at* http://fall.fsulawrc.com/collection/FlaStat/FlaStat1969/vol3/FlaStat1969v3_OCR_Part3.pdf; App. 140.

after the trial has commenced." ***Id.*** at 258. The Court noted that the historical rule had been that, in felony cases, the right to presence could not be waived under any circumstances. ***Id.*** at 259. However, in ***Diaz v. United States***, 223 U.S. 442 (1912), the Court had "authorized a limited exception to the general rule … that was codified eventually in Rule 43": waiver could occur if a defendant voluntarily absented himself "after the trial has begun in his presence." ***Id.*** at 259-260.

Though the government urged the court to uphold the conviction, the Court concluded that Rule 43 "mean[s] what it says." ***Id.*** at 261. It also observed that the rule made sense: the cost of suspending a trial that has already begun will usually be higher than the cost of postponing a trial that has not started. ***Id.*** at 261. The defendant's presence during some portion of the trial also puts the defendant on notice that the trial is likely to continue—making the choice to depart more likely to be a knowing and voluntary waiver of the right to presence. ***Id.*** at 261-62. Finally, "a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him." ***Id.*** at 262.

Here, the legislature—like the drafters of the federal rule in ***Crosby***—*could have* set different conditions on waiver by voluntary absence. The legislature *could have* written a statute permitting a trial to go forward where a defendant was absent from the very start (so long as the constitutional right to presence was knowingly and voluntarily waived, *see* ***Divanovic***, 200 Wis. 2d at 220-21). It might have done so, for example, after ***Dwyer***, 181 Wis. 2d at 831, 836, in which the court of appeals granted a new trial to a defendant who had voluntarily left the courtroom after being denied the

opportunity to hire a different lawyer. If this result offended the legislature, it could have changed the statute. (In fact, both the Florida rule on which ours was modeled and the Federal Rule interpreted in ***Crosby*** have since been amended to permit trial *in absentia* where the defendant engages in "disruptive" behavior. Fla. CRPr 3-180(c)(1) (2017); Fed. R. Crim. Pro. 43(c)(1)(C)).

Twenty-three years after ***Dwyer***, however, the legislature has not done so. Like Rule 43 in ***Crosby***, the statute still "says what it says"—that a defendant must be present for trial, but that a trial will go forward where a defendant is "present at the beginning of trial and thereafter … voluntarily absents himself or herself … without leave." Mr. Washington was not present at the beginning of trial. His absence thus did not satisfy Wis. Stat. § 971.04(3)'s conditions for waiver by voluntary absence. His conviction was obtained in violation of his statutory right to presence, and must be overturned.

Below, the state nevertheless insisted that Mr. Washington had waived[3] his statutory right to be present—that he, by his absence, consented to trial *in absentia*. The problem with this argument—as the court of appeals noted in ***Dwyer***—is that Wis. Stat. § 971.04(3)

[3] As this court has often stated, "waiver" and "forfeiture" are distinct concepts, with "waiver" meaning "the intentional relinquishment or abandonment of a known right" and "forfeiture" meaning "the failure to make a timely assertion of a right." ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. This court held in ***State v. Soto***, 2012 WI 93, ¶43, 343 Wis. 2d 43, 817 N.W.2d 848, that waiver, rather than forfeiture, is the means by which a criminal defendant may give up the right to presence.

expressly "delimits … *when* [such] consent may be inferred by conduct: [when] the defendant is present at the beginning of trial…." ***Dwyer***, 181 Wis. 2d at 837. If this statutory precondition is not met, there can be no waiver by conduct.

This same fact refutes the court of appeals' conclusion that Mr. Washington's convictions should be upheld because he made an "express, affirmative, intentional choice not to be present." ***Washington***, 2016AP238-CR, ¶18; App. 109. As Mr. Washington noted below, the intentional nature of his actions is beside the point. Wisconsin Stat. § 971.04(3) is explicitly *about* "voluntary" absence, and the defendants in ***Dwyer*** and ***Koopmans*** just as clearly chose to be absent from court. Dwyer failed to return to court after a brief recess when her request for a new lawyer was denied. ***Dwyer***, 181 Wis. 2d at 832. In ***Koopmans***, the convicted defendant fled the country before sentencing; her attorney stipulated that she was a fugitive and that her absence was voluntary. 210 Wis. 2d at 674. The acts of both Dwyer and Koopmans made perfectly clear that they did not wish to be present—and in fact the decisions call their absences "voluntary." ***Koopmans***, 210 Wis. 2d at 679, ***Dwyer***, 181 Wis. 2d at 826. Nevertheless, this court and the court of appeals concluded they had not validly waived their statutory right to be present.

Here, Mr. Washington "semi was removed and semi left on his own" after complaining about his attorney's representation and saying there should be "no trial." Though, according to his attorney and a bailiff, he later refused to return from his jail cell, that was the extent of his communication with the court on the matter. This is not a case, like ***Soto***, 343 Wis. 2d 43, ¶33, in which the defendant knowingly, intelligently and voluntarily waived a right after a thorough colloquy. Mr. Washington's verbal refusals to return to court simply made explicit what his actions had already

demonstrated: that he was voluntarily absenting himself from the courtroom. Because Wis. Stat. § 971.04(3) was not complied with, Mr. Washington's absence did not waive his right to presence, his trial *in absentia* was unlawful, and his convictions must be reversed.

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 10th day of May, 2017.

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 2,820 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 10th day of May, 2017.

Signed:

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Page

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; and (3) 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 10th day of May, 2017.

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