STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT III

Appellate Case No: 2016AP796CR
Outagamie County Case No: 13-CM-1611

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

Michael Steel, Jr.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

SCHAEFER LAW FIRM, S.C.
By: Attorney Linda J. Schaefer
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920) 746-3180
linda.schaefer@gmail.com
Attorney for Defendant-Appellant

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STATEMENT OF THE ISSUE

DID THE TRIAL COURT ERR WHEN IT DENIED CANNON REPRESENTATION BY COUNSEL OF HIS CHOICE AND FORCED HIM TO CONTINUE WITH TRIAL AGAINST HIS WILL?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal are controlled by settled state and federal law and, therefore, the appellant does not recommend oral argument or publication.

SUMMARY OF THE ARGUMENT

The trial court erred when it denied Steel's repeated request to remove Attorney Ditter from his case so that he could have alternate counsel or represent himself. Steel should have been allowed to release Attorney Ditter in favor of a different attorney, and he should have been provided a fair opportunity to retain alternate counsel.

The trial court also erred when it denied Steel's request, through his attorney, to reschedule his trial due to a

calendar conflict, especially after the State requested and was granted a new trial date that caused the conflict.

Because of these errors, Steel asks that this appellate court reverse his conviction, vacate his judgment of conviction, and grant him a new trial.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Early in the morning of August 31, 2013, Officer Michael Thielke of the Grand Chute Police Department stopped a vehicle on US Highway 41 because of a license plate problem. (R. 2:2). Michael Steel, Jr. (Steel), who was sitting in the back seat of the vehicle, verbally identified himself as Ted Bell. (R. 2:2). A brief time later Officer Thielke searched Steel and found, in Steel's wallet, various identification documents including a Wisconsin ID card, credit cards, and a social security card, all in the name of Michael Steel. (R. 2:2). Steel then admitted that he had been untruthful. (R. 2:2). Steel was taken into custody on an outstanding Community Corrections warrant. (R. 2:2).

On December 13, 2013, the State filed a criminal complaint[1] in Outagamie County Circuit Court charging Steel with Obstructing an Officer, as a repeater, contrary to sec. 946.41(1), 939.51(3)(a), 939.62(1)(a), Wis. Stats. (R. 2). Steel had a scheduled initial appearance on January 28, 2014; however, he was not present. (R. 30). He was incarcerated at Redgranite Correctional Institution. (R. 31:2). Steel's initial appearance continued on March 27, 2014 when he entered a not guilty plea. (R. 31:2). Attorney Kavanaugh filed a speedy trial demand on behalf of her client on April 15, 2014. (R. 8).

Ultimately, after Steel failed to appear for proceedings on December 2 and 9, 2014, the court issued a bench warrant; Steel was brought into court on June 30, 2015, at which hearing he restated his guilty plea, had bond set, and a jury trial was calendared on August 11 or 12, 2015. (R. 32).

Attorney Ditter, Steel's successor counsel, was appointed on July 2, 2015, when the August 11 and 12 trial

[1] Ultimately, on August 3, 2015, the State filed an amended criminal complaint adding several aliases used by Steel. (R.13)

dates still on the court's calendar. (R. 12). On August 5, 2015, the State petitioned the court for a new trial date because witness Officer Michael Thielke would be out of the area on the previously scheduled trial dates. (R. 14). Steel's trial was rescheduled to August 18, 2015, on which date Attorney Ditter had a previously scheduled trial in another matter; consequently, on August 13, 2015, Attorney Ditter asked the court to reschedule Steel's trial because of his previously scheduled trial. (R. 18). His request was denied. (R. 18).

The matter proceeded to trial on August 18, 2015, at which time Steel objected to the process, insisting that he wanted to replace his attorney, that his witnesses were not present to testify, that he felt unprepared for trial, and that he did not want to have a trial on that date. (R. 33:34-35). In response to the court's solicitation of any objections to the form of voir dire and selection, Steel responded, "Well, I would like to fire my attorney. He did not present my witnesses and I'm not comfortable with him...at all." And as

follow up, "I'm not comfortable going to trial with my attorney, period." (R. 33:34).

The court recited some of the history of the case, that it had been pending for nearly two years, and that Steel had other attorneys that either withdrew or were discharged. (R. 33:34). The court stated that it was aware that Attorney Ditter "had been doing this type of work for 30-plus years." (R. 33:35). Finally, the court advised Steel that "[t]he scope of this trial is very limited." (R. 33:35). Steel was advised to cooperate with his lawyer in the process. (R. 33:35).

Immediately, Steel made a further objection. (R. 33:35). He told Judge Biskupic that his witnesses were not present, even though he had asked his attorney to call them. (R. 33:35). Steel reiterated that he was not ready for trial on that date, because he did not have his witnesses. (R. 33:35). The court continued the trial over Steel's objection. (R. 33:61).

After a break between the State's case and Steel's case, Attorney Ditter presented the court with a plea

questionnaire that Steel completed, in which he pled guilty to the charge of Obstructing an Officer. (R. 33:62. R. 21). Judge Biskupic conducted a colloquy with Steel regarding his right to testify or not to testify, and Steel confirmed his decision not to testify. (R. 33:64-66). As part of the colloquy, Judge Biskupic asked Steel if he thought he "had sufficient opportunity to thoroughly discuss [the case with his attorney] and his decision to testify." (R. 33:66). Steel responded that he had not had enough time. (R. 33:66).

The court continued its colloquy, asking Steel if he had enough time to discuss his case so that he could enter a plea. (R. 33:67). In response, Steel told the court that he had just received the discovery in the last couple of weeks and that was the reason he was not ready for trial. (R. 33:67). Steel states unequivocally that "I know I'm guilty," and "I didn't want to go to trial. I didn't want this but at the same time I wanted to go through my discovery and see can I have a defense?" (R. 33:67).

Ultimately, in spite of Steel's protestations that he wanted to enter a plea of guilty and that he did not want a trial, Judge Biskupic stated that he was not comfortable accepting Steel's plea because it might not be done freely, voluntarily, and intelligently. (R. 33:71). Steel continued to object. (R. 33:75, 77). After the jury began deliberations, Attorney Ditter made a final record of Steel's objections: "my client is reminding me he just wants to make the record that he is objecting to going forward with the trial and he intended to enter a plea." (R. 33:100).

The jury convicted Steel of one count of obstructing an officer as a repeater on August 18, 2015. (R. 33:102). Steel was sentenced immediately after trial, on August 18, 2015. (R. 33:107 et seq.). After arguments from Attorney Ditter and the State, Judge Biskupic sentenced Steel to 100 days in the county jail, consecutive to any other sentence, as well as a fine and costs. (R. 33:121).

STANDARD OF REVIEW

A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Industrial Roofing v. Marquardt***, 299 Wis.2d 81, 726 N.W.2d 898, 906, ¶41 (2007). (Additional citations omitted).

ARGUMENT

Introduction

Steel's right to representation by counsel of his choice was violated when Judge Biskupic refused to allow him to discharge his attorney. Steel stated and restated his reasons why he wanted a different attorney, but ultimately the court moved forward with the trial. In addition, the court exercised erroneous discretion when it denied a request by Steel's attorney to reschedule the trial due to a conflict with another trial on the same day, even though the court had granted a State's request for a new date a week or so earlier. Steel's

preparation for trial was jeopardized by the court's denial of this request.

I. THE TRIAL COURT EXERCISED ERRONEOUS DISCRETION WHEN IT DENIED STEEL REPRESENTATION BY COUNSEL OF HIS CHOICE.

a. The right to representation by counsel is provided in the Sixth Amendment to the US Constitution and in case law.

The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." ***U.S. Const.*** amend. VI. The US Supreme Court elaborated further on this provision and stated that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." ***United States v. Cuauhtemoc Gonzalez-Lopez,*** 547 US. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409. (additional citations omitted.)

> "(w)here the right to be assisted by counsel of one's choice is wrongly denied, …[then] (d)eprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he

> wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice— which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.´ ***Id*** at III.

US v. Gonzalez-Lopez may be distinguished from the case at bar in that it draws a difference between the right of a defendant who is financially able to pay for his own attorney to choose his own counsel, as opposed to the right of a defendant who requires appointed counsel because of financial destitution. ***Id.*** at II, citing ***Wheat v. United States***, 486 U.S. 153, 159 (1988). The court also notes ***Powell v. Alabama***, 287 U.S. 45, 53 (1932) (…"that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").

The remedy provided in ***US v. Gonzalez-Lopez*** is reversal (denial of Gonzalez-Lopez's right of choice of counsel was a structural error, requiring reversal without harmless error analysis. ***US v. Gonzalez-Lopez*** at IV.

The question in Steel's case is not the effectiveness of Steel's appointed counsel, but rather that Steel affirmatively wished to have other representation. Steel spoke clearly on the record when he stated that he wanted to "fire" his lawyer. The court told Steel that his attorney was experienced and that his (Steel's) case was of limited scope, then refused to stop the trial to give Steel time to either obtain alternate counsel or to resolve issues with his present attorney. On numerous occasions throughout his trial, as noted above, Steel attempted to stop the proceedings, and did his best to make it clear to the court that he was not comfortable with his preparation for the trial.

At the end of the State's case, Steel provided the court with a completed plea questionnaire and stated that he was prepared to enter a guilty plea to the charge. As described above, Steel offered as one reason for offering a plea was that he did not want a trial; he only wanted to see the discovery and have time to review the case more completely. However, he also stated clearly and unequivocally that "I know I'm

guilty." The court discounted Steel's admission and his desire to enter a guilty plea and denied his request, instead forcing him to continue with the trial.

Although Steel indicated clearly to the court that he wanted to fire his appointed attorney, Steel was nevertheless denied any fair opportunity to retain counsel of his own choosing because the court continued with the trial on that same day. While efficient and orderly administration of justice is an important goal, nevertheless it should not trump the right of a defendant to be represented not only by an attorney that is effective and competent but also by an attorney of the defendant's choosing.

The trial court exercised erroneous discretion when it denied Steel a fair opportunity to retain counsel of his own choosing, thus denying him the right to counsel of his own choice.

I. THE TRIAL COURT EXERCISED ERRONEOUS DISCRETION WHEN IT DENIED STEEL'S REQUEST, THROUGH COUNSEL, TO RESCHEDULE HIS TRIAL.

A request for an adjournment or a continuance is a matter left to the discretion of the trial court and will be reversed only upon an erroneous exercise of discretion. ***State v. Anastas*****,** 107 Wis. 2d 270, 272, 320 N.W.2d 15 (Ct. App. 1982). Further, "[a] denial of a continuance potentially implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law." ***State v. Wollman*****,** 86 Wis. 2d 459, 468, 273 N.W.2d 225, 230 (1979). In order to determine whether the trial court misused its discretion, the ***Wollman*** court points out that the court must balance "the defendant's constitutional right to adequate representation by counsel [and due process] against the public interest in the prompt and efficient administration of justice." ***Id*****.** For this balancing test, the court should consider:

(1) the length of the delay requested;

(2) whether lead counsel has associates prepared to try the case in his absence;

(3) whether other continuances have been requested and received by the movant;

(4) the inconvenience to the parties, witnesses and the court;

(5) whether the delay seems to be for legitimate reasons;

(6) other relevant factors.

Id. at 470.

Here, consideration of these factors leads to a conclusion that Attorney Ditter's request for a new date was reasonable and should have been granted.

1. Length of the delay. Attorney Ditter did not specify any length of delay, only that August 18, 2015 conflicted with another court proceeding.

2. Whether the lead attorney had an associate prepared to try the case. There was no associate for this trial.

3. Whether other continuances had been requested and/or received by the movant. Attorney Ditter's request was the first and only request that he made regarding the trial date. The State, however, had requested and been granted a new trial date.

4. Inconvenience to parties, witnesses, and court.

There was only one witness in this case, a law enforcement officer. Officers testify at trials with some regularity, and his inconvenience would have been minimal. The parties would not be unusually inconvenienced, certainly not any more than was caused by the State's permitted continuance. While it may have been inconvenient for the court to go through the rescheduling process, nevertheless Attorney Ditter's request was not unusually difficult. Courts reschedule matters on a regular basis.

5. Legitimate reason for the delay. Attorney Ditter had another trial, already scheduled, on the new date assigned for Steel's trial. This is an undeniably legitimate reason to grant Attorney Ditter's request to change the date of Steel's trial.

6. Other relevant factors. From Attorney Ditter's Appointment on July 2, 2015, to the new trial date, August 18, 2015 was only approximately six weeks. Given the fact that Attorney Ditter had another trial on the same date which would, of course, make demands on his time, Steel raised a very legitimate concern regarding his inability in that time to

sufficiently review discovery and discuss the case with his attorney. Allowing the trial to be rescheduled, even for a short period of time, may well have provided enough time for Attorney Ditter to work with Steel in such a fashion that trial could have been avoided altogether. At the very least, Steel would have been better prepared for trial. Such an approach would have contributed to the fair and efficient administration of justice.

We can never know if the outcome of this case might have been different had the court allowed Steel even a small amount of additional time to review the discovery in his case with his attorney and prepare for his trial. Steel actively asserted his need to have more opportunity to discuss the case with his attorney. Throughout his trial Steel continued to address his discomfort at being forced into a trial that he did not want and for which he did not feel adequately prepared.

The court exercised erroneous discretion when it denied Steel's request, through Attorney Ditter, to reschedule his trial.

CONCLUSION

WHEREFOR, Steel respectfully requests that this Court reverse his conviction, vacate his judgment of conviction, and grant him a new trial in Outagamie County Case Number 13-CM-1611 because the circuit court erred when it denied Steel his right to be represented by counsel of his choice and further because Steel's request, through counsel, for a new trial date was erroneously denied.

Dated this 5th day of August, 2016.

Respectfully submitted,

ATTORNEY LINDA J. SCHAEFER
SCHAEFER LAW FIRM, S.C.
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920)746-3180
linda.schaefer@gmail.com

Attorney for Defendant-Appellant

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 3,628 words.

Dated this 5th day of August, 2016.

Signed:

ATTORNEY LINDA J. SCHAEFER
SCHAEFER LAW FIRM, S.C.
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920)746-3180
linda.schaefer@gmail.com

Attorney for Defendant-Appellant

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 5th day of August, 2016.

Signed:

ATTORNEY LINDA J. SCHAEFER
SCHAEFER LAW FIRM, S.C.
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920)746-3180
linda.schaefer@gmail.com

Attorney for Defendant-Appellant

A P P E N D I X

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STATE OF WISCONSIN,

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APPENDIX

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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; 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 5th day of August, 2016.

Signed:

ATTORNEY LINDA J. SCHAEFER
SCHAEFER LAW FIRM, S.C.
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920)746-3180
linda.schaefer@gmail.com

Attorney for Defendant-Appellant