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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2016AP000796-CR
Outagamie County Case No. 13CM1611

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Michael NMI Steel Jr.,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT
COURT BRANCH 6 FOR OUTAGAMIE COUNTY

The Honorable Vincent R. Biskupic, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication of the decision in this matter.

STATEMENT OF THE CASE

Subject to supplementation where needed, the state relies upon the statement of the case in Steel's brief.

STANDARD OF REVIEW

The standard of review is whether or not the trial court erroneously exercised its discretion. State v.

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Lomax, 146 Wis. 2d 356, 359, 432 N.W.2d 89, 90 (1988).

State v. Wollman, 86 Wis. 2d 459, 468, 273 N.W.2d 225, 230 (1979).

ARGUMENT

The trial court acted within its discretion when denying the Steel's request to substitute his appointed counsel.

As Steel's trial attorney was appointed to him and not privately retained (R. 12-1), he is not entitled to the attorney of his choice. State v. Jones, 2010 WI 72, ¶ 38, 326 Wis. 2d 380, 408, 797 N.W.2d 378, 39. "Whether counsel should be relieved and a new attorney appointed in his or her place is a matter within the trial court's discretion." Lomax, 146 Wis. 2d at 359.

When considering whether the trial court abused its discretion, the reviewing court shall consider "(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." Id. at 359. Individual factors may weigh more heavily than others

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depending on the circumstances, but the test is not a
"balancing" test. Jones, 2010 WI 72 at ¶ 30

Adequacy of the Court's Inquiry

Once a defendant's complaints about counsel are known, the court may exercise judicial discretion. Id. 362. Even if a full inquiry is not conducted, the decision to not permit an indigent defendant to get a new lawyer "will not be overturned when the Record is devoid of evidence of a conflict that made counsel's continued representation untenable. State v. Boyd, 2011 WI App 25, ¶ 13, 331 Wis. 2d 697, 711, 797 N.W.2d 546, 552-53. Mere disagreement over strategy does not suffice. Id.

Steel made the basis for his dissatisfaction known to the trial court. Steel spoke at length about Atty. Ditter failing to secure witnesses he wanted to present and his disagreement with counsel he was receiving from his attorney. (R. 33:34, 35). The trial court determined this issue to be a strategic decision by Atty. Ditter. (R. 33:35, 36). Steel and his attorney were allowed a break in the proceedings to discuss matters further. (R. 33:36).

Nowhere during this exchange on the morning of trial did Atty. Ditter express an inability or unwillingness to proceed with trial. During an aborted attempt by the Steel

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to enter a plea mid-trial, Atty. Ditter stated affirmatively that he believed he had had enough time to discuss the case with Steel. (R. 33:65). In dealing with Steel's complaint, the trial court referenced the significant length of time the case had been pending, the fact that Steel had a prior attorney that had withdrawn or been discharged, and his general knowledge of the experience and capability of Atty. Ditter.

During that aborted attempt to enter a plea, Steel also disclosed that he was dissatisfied with how much time he had to review the discovery in his case. (R. 33:67). Steel expressed that he never wanted to go to trial and renewed his previous objections. (R. 33:69).

Though the trial court did not specifically inquire as to why Steel was dissatisfied with Atty. Ditter, the reasons for his dissatisfaction did come to light. They were the absence of Steel's desired witnesses, the recency of him being provided with discovery. Only the complaint about the witness issue is a complaint about Atty. Ditter, and the trial court explicitly found that to be a disagreement on strategy. His discovery complaint was addressed before it was even raised when the trial court observed the limited scope of the trial. (R. 33:35).

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If there is an issue with the denial of Steel's request for substitute counsel, it is with the court's inquiry. While the trial court did not pose questions to Steel regarding the basis for his request, the basis for Steel's request was ascertained and the record is devoid of any indicia that a breakdown in communication existed that made Atty. Ditter's continued representation untenable. Had it been untenable, there would be deficiencies for Steel to raise.

If there is a defect in the trial court's inquiry, the proper remedy is to return the case to the trial court for a retrospective hearing so that the court can conduct a factual inquiry to determine if a new attorney should have been appointed. Lomax, 146 Wis. 2d at 363-64. If Steel was not entitled to substitution and the only error was the trial court's failure to conduct a sufficient inquiry, reversal would be an undeserved windfall. Id.

The Timeliness of the Motion.

"Eleventh-hour requests are generally frowned upon as a mere tactic to delay the trial." Id. at 361-62. Such requests could be considered timely if the complaint in question had only arisen the day of trial. Id. at 362. The record in this case indicates that Steel's request

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was not timely. The record demonstrates Steel's purpose was dilatory and that had his concerns been legitimate, he would have been able to raise them prior to the morning of trial. This point will be explored in greater detail below.

The Alleged Conflict Was Not so Great that it Likely Resulted in a Total Lack of Communication that Prevented an Adequate Defense and Frustrated a Fair Presentation of the Case.

If Steel and Atty. Ditter were able to communicate sufficiently for Atty. Ditter to present an adequate defense, there is no denial of Steel's right to an attorney. Jones, 2010 WI 72, ¶ 45. None of the issues raised by Steel constitute an allegation of a total lack of communication, merely disagreement over strategy. Steel has alleged no deficiency in Atty. Ditter's trial defense.

Had Steel alleged a conflict preventing an adequate defense and frustrating a fair presentation of the case, the final portion of the analysis of his claim is taken from Phifer v. State, 64 Wis.2d 24, 218 N.W.2d 354 (1974). Lomax adopts this framework for questions of the denial of substitute counsel and the associated delay of a trial.

The factors Lomax employs for considering the trial courts exercise of discretion when there is a request for

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substitution of trial counsel and the associated request
for a continuance are adopted in Phifer, 64 Wis.2d at 31.

The first factor for consideration is the length of
the delay requested. In the present case, no specific
length of delay is requested.

The second factor for consideration is whether the
lead counsel has associates prepared to try the case. In
the present case, there is no indication of Atty. Ditter
having any associate.

Third, the Court must consider whether any
continuances had previously been requested or received by
the moving party. Steel had not previously requested any
continuances in court, however Steel played a strong role
in the delay in concluding the case by failing to keep
contact with his prior counsel and to appear for court as
scheduled. This case was delayed for several months while
a warrant was outstanding for his arrest and he made no
apparent effort to participate in the case until he was
once again in custody at the Brown County Jail. (R. 9-1,
11-1; State's Appendices B-E).

The next consideration is the inconvenience to the
parties, witnesses and the court. Steel's desire to
discharge his attorney on the morning of trial would have

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resulted in inconvenience to the law enforcement witness, who was not local to the Outagamie County area, where the trial was held. (R. 15-1). In addition, time and resources had been expended on the gathering of a jury pool. Time and resources of both the court and the potential jurors would have been wasted had Steel's request been granted. These inconveniences, while not insurmountable alone, are more significant than Steel argues in his brief and they warrant consideration.

The Court must also consider whether the reason for the proposed delay seems legitimate or whether it is dilatory in purpose. The stated reason for Steel's desire to discharge Atty. Ditter is that Atty. Ditter did not intend to present two witnesses that Steel wanted to be heard, something the trial court properly found to be a strategic decision by an experienced attorney. Steel additionally raised the issue whether he had adequate time to prepare for trial.

Steel's stated complaints were raised only on the morning of trial in the context of his claim that Atty. Ditter did not secure witnesses he wanted. Steel claimed to have received discovery approximately two weeks prior. With a trial of limited scope and simple issues in play,

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two weeks was ample time for Steel to review discovery, especially if one considers that he would have been familiar with the facts of the case, having been present for the all of the events at issue for trial.

Additionally, Steel's purported reason for his request appears less legitimate if one considers that it was his actions that caused the matter to be delayed for the better part of the year prior. Had preparation for trial, including strategic considerations, been his actual concern, he needed have done nothing more than keep in contact with his prior attorney or who had been provided with discovery approximately 16 months prior to the trial. At the very least, he could have appeared in court when required. Steel's purpose in making his requests was to further frustrate the court process.

Finally, the Court must consider other relevant factors. In addressing similar questions, Federal Courts have relied upon the analysis of United States v. Miller, 327 F.3d 598, 601 (7th Cir. 2003). The overlap in analysis is substantial, but not complete. Miller factors include the defendant's role in shortening his available preparation time and the availability of discovery from the prosecution. Both of these considerations are addressed

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above as they relate to the Lomax analysis, but it is instructive that the Miller court holds these considerations to be relevant on their own.

Harmless Error

If the trial court erred in denying Steel's request to discharge his trial attorney and delay his trial accordingly, the Court need not grant any relief to Steel if the error is harmless. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999).

Steel has offered no additional basis for how the denial of his request for a new attorney impacted the outcome of the case. There is none.

Denial of Attorney Ditter's Request for a Continuance

The denial of a continuance is a discretionary decision by the trial court that potentially implicates a defendant's Sixth and Fourteenth amendment rights. Wollman, 86 Wis. 2d at 468.

At issue are two requests for continuance that are, by any practical measure, separate and distinct. The first is Atty. Ditter's request to adjourn the trial based upon a scheduling conflict. The second is the Steel's request associated with his attempt to discharge Atty. Ditter. The request from the day of trial is addressed above. Only

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Atty. Ditter's written request to adjourn the trial date need be addressed further as Steel's request is addressed within the prior analysis.

Wollman sets out the six considerations it sets for determining whether a defendant's Sixth and Fourteenth Amendment rights were violated. Wollman, 86 Wis.2d at 470. These considerations are also contained within the Lomax analysis.

The first consideration is the length of the delay requested. No length was specified.

The second consideration is whether the lead attorney had an associate prepared to try the case. There is no indication of Atty. Ditter having an associate available

Third, the Court must consider whether any continuances had previously been requested or received by the moving party. Steel had not previously requested any continuances. As note above however, Steel was responsible for a significant delay in the proceedings by his failure to participate in the case.

Fourth, the Court is to consider any inconvenience to the parties, witnesses and the trial court that the request may have created. The granting of Atty. Ditter's original

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request to reschedule the trial in this matter would have been of manageable inconvenience.

Fifth, the Court must consider whether the reason for the requested continuance was legitimate or whether it was dilatory. Atty. Ditter's request to adjourn the trial was legitimate when it was made.

Finally, the Court should any other relevant factors. Among the additional relevant factors are the facts that the case had been pending for an lengthy period of time. Additionally, Atty. Ditter was able to resolve the conflict and appear for trial. He did so without alleging any lack of preparation of to prepare for trial, rendering the request moot.

Given these considerations, the trial court was well within its discretion when denying Steel's request for a continuance. Atty. Ditter's request based upon entirely separate considerations from the ability to prepare, became moot when the conflict was resolved.

Harmless Error / Lack of Prejudice

Should the Court determine that the trial court erroneously exercised its discretion in denying Steel's request for an adjournment, the Court should find that the error was harmless and did not prejudice Steel. There is

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nothing in the record that suggests a different outcome would have been had if Atty. Ditter's ultimately moot request had been granted.

Conclusion

Steel's appeal should be denied because the trial court did not erroneously exercise discretion on either issue being appealed. Any alleged error would be harmless and would not have prejudiced Steel.

Respectfully submitted this 14th day of October, 2016.

By: _____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Dated: October 14, 2016

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on October 14, 2016, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: October 13, 2016

Signature: _____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 14th day of October, 2016.

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