STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON GARCIA, JR,

Defendant-Appellant-Petitioner.

On Review of a Decision in the Wisconsin Court of Appeals Affirming a Judgment of Conviction in the Milwaukee County Circuit Court, the Honorable William S. Pocan presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The probable cause hearing initiated adversary criminal proceedings.

The State devotes significant effort to supporting a proposition that was never in question—that the probable cause proceeding was not adversarial, and Mr. Garcia did not have a right to counsel at that hearing.[1] That is true, but beside the point. The question is not whether the probable cause hearing was *itself* adversarial, but whether it *initiated* adversarial judicial criminal proceedings such that the right to counsel attached, and Mr. Garcia was entitled to counsel at all *subsequent critical stages*, such as the lineup. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The State conflates the two questions throughout its argument.[2]

Mr. Garcia argues that the *Riverside* probable cause hearing "initiated judicial criminal proceedings." Within the meaning of *Kirby* and its progeny, culminating with *Rothgery v. Gillespie County, 554 U.S. 194 (2008)*. Therefore, he was entitled to counsel at all critical stages of the proceedings that followed, including the lineup.

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[1] Response Brief at 9-11, quoting *Gerstein*, 420 U.S. at 120; *State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152 (1993).

[2] Response Brief at 14.

Under *Rothgery*, this is true even though a criminal complaint, which would have been necessary to formally commence the criminal action, had not been filed.

The State, clings to the idea that only filing of a criminal complaint by a prosecutor is sufficient in Wisconsin to initiate adversarial criminal proceedings. The State cites *Jones v. State*, 63 Wis. 2d 97, 105, 216 N.W.2d 224 (1974), which established a bright-line rule that the right to counsel does not attach unless a warrant or complaint is issued.[3] In *Jones*, this Court arrived at its rule by interpreting the then-recent decision of the Supreme Court in *Kirby*. This Court interpreted *Kirby* to establish a "line of demarcation" that was "definite" and held that no right to counsel attached until a complaint or warrant was issued. *Id.* In Wisconsin, only a district attorney can issue a complaint or initiate the issuance of a warrant. Wis. Stat. §968.02(1).

Jones provides no guidance in this case. First, it pre-dated *Riverside* and *Gerstein* and failed to account for whether a *Riverside* hearing would initiate adversary criminal proceedings. More importantly, the bright-line rule *Jones* established is now defunct. In *Rothgery*, the Supreme Court examined *Kirby* and its subsequent decisions and flatly rejected the idea that the filing of charges by a prosecutor was necessary to initiate judicial criminal proceedings. In that case, the Court concluded that

[3] Response Brief at 7.

adversary judicial criminal proceedings were initiated although there was no involvement by a prosecutor and no formal charge filed other than the written accusation of a police officer. *Rothgery*, 554 U.S. at 195.

The State attempts to distinguish the Texas probable cause hearing at issue in *Rothgery* from the one in this case. The State says that the hearing in *Rothgery* was a proceeding "peculiar to Texas."[4] But the hearing, mandated by Tex. Code Crim. Proc. Ann., Art. 15.17(a) was plainly just Texas' response to *Riverside*. The statute begins:

> (a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in any other county of this state. . .

The State insists that the Texas proceeding was "akin Wisconsin's initial appearance" as set forth in Wis. Stat. §§ 970.01, 970.02.[5] The State then points out that at the initial appearance in

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[4] Response Brief at 12.

[5] Response Brief at 13, citing Tex. Crim. Code Proc. Ann., art. 15.17(a); Wis. Stat. §§ 970.01, 970.02.

Wisconsin, "the State has filed charges."[6] Therefore, the State's logic goes, because the State had not filed charges against Mr. Garcia, his probable cause proceeding was not the same as the hearing in *Rothgery*, and his hearing did not initiate adversarial criminal proceedings. The State's circular logic ignores the critical way in which the hearing in *Rothgery* was unlike Wisconsin's initial appearance under Wis. Stat. §§ 970.01 and 970.02 and like the *Riverside* proceeding in this case. The filing of a formal pleading by a prosecutor was not necessary to trigger the Texas hearing—like the probable cause hearing in this case, it was required whenever a person was arrested and was to be held beyond 48 hours. *Rothgery,* 554 U.S. at 209. Unlike Wisconsin's statutory initial appearance, the Texas hearing required only an accusation by a police officer, not the filing of a complaint or other formal pleading.

The State points out that the Texas statute directed the magistrate "to inform Rothgery of the charge against him, his right to retain counsel, his right to stay silent, his right to have counsel with him during interrogations, and his right to stop the interrogations."[7] Those things did not happen at the probable cause hearing in this case. However, none of those things was even mentioned, much less dispositive, in *Rothgery*. Rather, the Court held that it was sufficient that the hearing was Rothgery's

[6] Response Brief at 13.

[7] Response Brief at 12, citing Tex. Code Crim. Proc. Ann., art. 15.17(a)

"initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." *Rothgery*., 554 U.S. at 213.

Part of the difficulty is that among the decisions of the various courts and the statutes of the various jurisdictions, there is no uniformity in the definition of terms like "charge," "formal," "accusation," and "initial appearance." For example, the Court in *Rothgery* used the phrase, "initial appearance," but it was not referring to the statutorily created and defined "initial appearance" under Wis. Stat. §970.01 and 970.02. The Court was simply referring to an "initial" or "first" appearance. *Rothgery*, 554 U.S. at 194 (right to counsel applies "at the first appearance before a judicial officer").

The lack of uniformity in defining terms has led the State to oversimplify. For example, quoting *State v. Copening*, 103 Wis. 2d 564, 576, 309 N.W.2d 850 (Ct. App. 1981), the State points out that "[i]n Wisconsin, a criminal proceeding is commenced by the filing of a complaint."[8] The State seems to assume that because the criminal proceedings were not "commenced" as defined in Wisconsin case law, "adversarial judicial criminal proceedings" cannot have been "initiated" as those terms are used in the decisions of the Supreme Court. But this is an oversimplification. In *Rothgery*, the Court concluded that "adversary judicial criminal proceedings" were "initiated" even though the hearing that initiated

[8] Response Brief at 11.

them did not require the filing of a complaint or similar charging document, and no prosecutor was involved.

Similarly, the State relies on the use of the word "charged" in *Kirby* and *Rothgery*. The State notes that under *Kirby,* the Sixth Amendment right to counsel does not attach until the State has "charged" the defendant with a crime[9] and that Rothgery was "charged."[10] The State assumes "charged" in the Supreme Court cases must mean what we commonly understand it to mean in Wisconsin—the filing of a complaint, which only a prosecutor can do. But "charged," as it is used in the Supreme Court cases, does not have so narrow a meaning. It cannot. The hearing in *Rothgery* did not involve or require the filing of a charging document by a prosecutor. In *Rothgery* the "charge" was a written accusation by a police officer just like the one filed in this case.

In short, nothing happened in *Rothgery* to initiate criminal proceedings that did not happen here except that Rothgery was physically brought before the magistrate, where Mr. Garcia was not. That is why the court of appeals relied so heavily on that distinction.[11] (Slip op., ¶ 27; App 111).

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[9] Response Brief at 13, citing *Kirby*, 406 U.S. at 689

[10] Response Brief at 12, citing *Rothgery*, 554 U.S. at 196.

[11] As argued in Mr. Garcia's principal brief at pages 21-25, that distinction is meaningless to the constitutional analysis.

Still, the State insists that some signal of the State's commitment to prosecute is necessary beyond the police decision to arrest the defendant and file the written accusation necessary to detain him for more than 48 hours. That argument was specifically rejected in *Rothgery*. There, the County argued that an attachment rule that did not require prosecutorial involvement would mean that the State had committed to prosecute *every* suspect arrested by the police, since the hearing under Tex. Code Crim. Proc. Ann., Art. 15.17(a) is *required for every arrestee*. The Court said:

> The answer, though, is that the State has done just that, subject to the option to change its official mind later. The State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the case gets to the jury room. But without a change of position, a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.

Rothgery, 554 U.S. at 209–10.

II. The lineup was unduly suggestive.

The State argues that the lineup was not suggestive because Mr. Garcia has not argued that he "stood out."[12] The State offers no authority for its

[12] Response Brief at 17-18.

apparent assumption that this is the only way a lineup can be unduly suggestive.

The State makes the tepid concession that the lineup procedure "arguably ran afoul of the model policy."[13] Yet the State insists that "there was nothing suggestive about the manner in which the police conducted the lineup."[14] The lineup was suggestive because it was conducted in a manner that encouraged the witness to compare the subjects and choose the one who most resembled the perpetrator relative to those other subjects. This Court is aware of that danger. See *State v. Hibl*, 2006 WI 52, ¶ 40, 290 Wis. 2d 595, 612, 714 N.W.2d 194, 202. The State is well-aware of that danger. (Model Policy, 5, 21; App. 214, 230). The officer who conducted the lineup had been trained not to conduct the lineup in such a way. (86: 73-74; App. 168-169).

The State accuses Mr. Garcia of "misreading" the model policy but does not say how.[15] The State acknowledges that, as the model policy explains, allowing the witnesses to view the lineup twice converted a sequential lineup into a quasi-simultaneous one. However, the State denies that this resulted in impermissible suggestiveness.[16] The State seems to argue that there was no harm because "both of the lineups were performed sequentially."[17]

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[13] Response Brief at 19.
[14] State's Response at 17.
[15] Response Brief at 18.
[16] Response Brief at 18.
[17] State's Brief at 19.

But, as the model policy makes clear, to convert a sequential lineup to a quasi-simultaneous one is to risk the benefit of the sequential procedure. (Model Policy, 121; App. 230). And the benefit of a sequential procedure that is put at risk is that it guards against the danger that the witness will compare the subjects and select the one who looks most like the perpetrator. (Model Policy, 5; App. 214). That is not a problem if the perpetrator is actually in the lineup. But this "tendency" is a very bad thing when the suspect who is placed in the lineup is innocent. (Id.). Mr. Garcia maintains that any procedure that results in a tendency of witnesses to choose the person who looks most *like* the perpetrator, regardless of whether the witness would otherwise be certain that he *is* the perpetrator, is impermissibly suggestive.

The State suggests that such a finding by this Court would run afoul of the "general rule in Wisconsin that whether an identification procedure is impermissibly suggestive must be decided on a case-by-case basis."[18] *State v. Benton*, 2001 WI App 81, ¶ 8, 243 Wis. 2d 54, 625 N.W.2d 923. However, this Court has recognized that sometimes a finding that a particular procedure is inherently unduly suggestive is necessary and appropriate. See *State v. Dubose*, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 699 N.W.2d 582. Mr. Garcia maintains that now the well-understood "relative judgment" risk makes this such a case.

[18] Response Brief at 20.

III. Mr. Garcia was unconstitutionally denied the right to represent himself at trial.

Under *Faretta v. California*, 422 U.S. 806 (1975), a defendant can be deemed to have forfeited his right to proceed pro se if he "deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834, n. 46. The State argues that there is no difference between this standard and the one set forth in *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), for forfeiture of the right to counsel based on pre-trial delay.[19]

This Court in *Cummings* spoke of "disruptive and defiant behavior" as the basis for forfeiture. *Id.* at 756–57. However, the court of appeals in this case focused solely on this Court's statement in a footnote in *Cummings* that "the triggering event for forfeiture is when the 'court becomes convinced that the orderly and efficient progression of the case [is] being frustrated . . .'" 199 Wis. at 754, n. 15. (Slip op., ¶ 46; App. 120). This reading of *Cummings* to require only a frustration of orderliness and efficiency without the antecedent "disruptive and defiant behavior" cannot be reconciled with *Faretta*.

It is important to note that Mr. Garcia did not engage in the kind of gamesmanship this Court was addressing in *Cummings* where the defendant refused utterly to cooperate with counsel while at the same time refusing to waive his right to counsel,

[19] Response Brief at 36.

placing the circuit court in an untenable position. *Id.*, at 750. In contrast, Mr. Garcia had disagreements with some of his attorneys. He asked for new attorneys. His requests were granted. When the court refused to grant his final request for a new lawyer, he asked to be allowed to represent himself.

The State embarks on a long recitation of the proceedings in this case, most of which is irrelevant to the issues before this Court. Most of the State's attention is devoted to Mr. Garcia's relationships with his attorneys and his requests for new counsel. The circuit court may well have been justified in putting an end to that much sooner than it did. *See*, *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). And it may be that under *Cummings*, the circuit court could have concluded at some point that Mr. Garcia had forfeited his right to counsel altogether. 199 Wis. 2d. at 754, n. 15. But that never happened.

Instead, the court granted requests for new counsel until Mr. Garcia sought to discharge Attorney Bihler. When the court left Mr. Garcia with the options of proceeding with Mr. Bihler or on his own, he elected to proceed *pro se*. At that point Mr. Garcia's previously granted requests for new counsel were water under the bridge. Once the circuit court found that Mr. Garcia validly waived his right to counsel and was competent to represent himself, he had a constitutional right to do so, absent "serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834, n. 46.

Despite the use of terms like "obstreperous," "disruptive," and "obstructive,"[20] to describe Mr. Garcia's behavior in court, the State fails to identify *any* actual instance of that. The State cites two transcript passages, claiming that the trial court told him "time and again that his behavior was obstructive," But the passages cited by the State contain no such accusation.[21]

The State's argument is essentially that Mr. Garcia forfeited his right to represent himself at some point before he even invoked it by requesting too many new attorneys. Mr. Garcia had legitimate concerns, including those about discovery and failure of counsel to file a legitimate motion to suppress the lineup. (77: 6-8, 12-15; 83: 6-7; 85: 18). At one point, Mr. Garcia expressed concerns about lack of communication, and attorney Bihler agreed with him, saying, "it is my fault, I should have been in more contact with him." (85: 18). It is hardly fair to say that his requests for new counsel were obstructionist and resulted in forfeiture of his right to proceed pro se when the court granted those requests and the State never once objected. Besides, that was not how the trial court saw it. The trial court based its decision on concern that Mr. Garcia was "argumentative" and would somehow misbehave at trial and "make a mockery of the system"—a concern not supported by any evidence. (87: 16-21; App. 200-205).

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[20] Response Brief at 39, 40, 41.

[21] Response Brief at 41, citing (84:9–17; 85:14– 15).

Finally the State argues that the court was justified in denying Mr. Garcia's request to represent himself because it would have resulted in delay. The State cites the motion for reconsideration Mr. Garcia filed *after* the court denied his request in which he asserted that an adjournment of the trial would have been necessary.[22] But Mr. Garcia's never indicated that he would need an adjournment prior to the court denying his motion, and that possibility played no part in the court's decision. If Mr. Garcia had sought an adjournment, the court may well have been justified in telling him that he would be allowed to represent himself only if he was prepared to proceed on the scheduled trial date. None of that happened.

[22] Response Brief at 40, citing (45: 54).

CONCLUSION

Mr. Garcia asks that this Court vacate his conviction and order a new trial at which evidence of D.L.'s lineup and in-court identifications of Mr. Garcia shall be excluded.

Dated this 28th day of March, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,988 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 28th day of March, 2019.

Signed:

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