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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

State of Wisconsin
Plaintiff-Respondent,
Appeal No. 2016AP002012
v.
Paula L. Elbe,
Defendant-Appellant.

State of Wisconsin
Plaintiff-Respondent,
Appeal No. 2016AP002013
v.
Emory J. Elbe,
Defendant-Appellant.

Consolidated Appeals From Orders of the Circuit Court For Sauk County, Branch I, Case No. 96-CM-710 and 96-CM-711, Hon. Michael P. Screnock, Presiding.

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF ISSUES PRESENTED

I. Does Article I Section 7 of the Wisconsin Constitution provide a right to counsel for all indigent defendants charged with a crime even if no jail is imposed?
Answered “No” by the Circuit Court.

II. If so, are the defendants entitled to an evidentiary hearing to determine if they were partially indigent on September 12, 1996 for purpose of PD 3.40(1)?
Answered “No” by the Circuit Court.

III. If partially indigent, must the convictions be vacated due to denial of the right to counsel provided by Article I Section 7 of the Wisconsin Constitution?
Answered “No” by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF APPEAL

These two appeals were consolidated by order dated October 26, 2016 from two related proceedings in the Circuit Court of Sauk County, Branch I, Hon. Michael P. Screnock, Presiding. The trial court issued an oral decision during a motion hearing on June 6, 2016 dismissing the motions brought by defendants to vacate their convictions. The defendants alleged their 1997 disorderly convictions were preceded by SPD improperly failing to recognize both defendants were partially indigent pursuant to PD 3.04(1).

Judge Screnock found no constitutional right as an indigent to counsel for the disorderly conduct prosecutions for the reason no jail imposed. Both defendants moved for reconsideration arguing Article I Section 7 of the Wisconsin Constitution afforded them broader protection than the Sixth Amendment to the U.S. Constitution. Judge Screnock denied the reconsideration motions in a Decision and Order dated September 28, 2016. This appeal is from the oral decision of June 6, 2016 (not reduced to a written order) and the Decision and Orders dated September 28, 2016.

Appellants must first establish the Circuit Court erred by ruling State ex rel Winnie v. Harris,75 Wis.2d 547, 556, 249 NW2d 791 (1977) has been overruled by implication. Next, Elbe's must show they are entitled to an evidentiary hearing to determine if they qualified for SPD counsel on September 12, 1996 pursuant to PD 3.04(1) as both being partially indigent. Denial of counsel is the type of due process violation that renders the convictions void. There is no time limit on vacating a void conviction.

Elbe's will ask the orders dismissing their motions to vacate be reversed and the matters remanded for an evidentiary hearing as to compliance with PD 3.04(1) on September 12, 1996.

Entries which are underlined are found in the record for Appeal 16-AP-2013 (Emory Elbe). All entries not underlined are found in the record Appeal 16-AP-2012 (Paula Elbe).

DENIAL OF SPD AND/OR DEAN COUNSEL

The criminal complaint against both defendants (1)(2) alleged on July 3, 1996 at Devil's Lake State Park a man was beating his wife on the beach and pushed her to the

ground. The wife slapped the husband in the face. Both husband and wife were arrested, with Mr. Elbe spending one day in jail. (8) No bond was set for Paula, however Emory had a $500 bond. (1) The initial appearance was August 28, 1996 (1).

Neither defendant was ever represented by counsel, and they were convicted pro se. The shelf life for the transcripts has expired however, minute sheets for the Court hearings remain available. The first hearing was August 28, 1996. (32) (37) Proceedings were continued to September 18, 1996. (2) (3)

Elbe's contacted SPD. On September 11, 1996 the Elbe's signed a motion for appointment of counsel prepared by SPD. (3) (4) This is a two-page document filed September 12, 1996. The second page of each motion (3-2) (4-2) is the same financial sheet. This page also appears in the record at (10-17). This financial sheet is in the Appendix at (A-Ap. 109).

The minute sheets for September 12, 1996 (33)(38) both begin at 10:45 AM and are generally the same. Attorney David Knaapen appeared from SPD. The request for indigent counsel, through SPD and/or Dean, was denied.

The minute sheets (33)(38) and the financial sheet (A-Ap. 109) show a family of five domiciled in Dane County. Paula Elbe worked at Marshall's and had take-home pay of $1,080 per month. Emory Elbe had no income.

Social Security earnings records for Emory Elbe for 1996 (14-3) show zero. Paula earned $12,730 dollars in 1996. (9-3) Other assets would be one vehicle worth $0 - $100, and another vehicle worth $400-$500. The Elbe's could not afford to hire private counsel at $750 retainer and $95 per hour. (3-1)(4-1) The motions also indicated SPD denied coverage as of September 11, 1996.

The length of the hearing on September 12, 1996 is unknown. The minutes do not show Mr. and Mrs. Elbe waived their right to be represented by separate counsel.

The next hearing was September 18, 1996. This was an initial appearance. (34)(39) Both cases were set for final pretrial on December 17, 1996. (4)(5) The minute sheets for December 17, 1996 (35)(40) show both defendants entered pleas. There had been previous plea discussions. (37)(42)

Paula would later disagree with the plea agreement (38)(39) and sentencing was set for February 3, 1997 (5). Sentencing took place January 27, 1997. (36) The sentence was $253. (6) The last date of activity for Paula's case was January 27, 1997.

Emory's case was set for February 17, 1997. (6) The minute sheet (41) says "can't afford Atty." The plea questionaire (7) has two hand written entries "no attorney." The sentence was $253. (8) The last date of activity on Emory's case was February 17, 1997.

THE SPD'S REGULATIONS

The administrative code provisions for the time period of July 2, 1996 – February 18, 1997 are substantially different then current regulations. The option of parital indigence, PD 3.04(1), has long since been repealed. A set of PD 3 in effect for that time period is in the Appendix. (A-Ap. 139-146)

The cost of counsel for a misdemeanor was $400. PD 3.02(1). If there was one attorney for both Emory and Paula that cost would be $400. If separate counsel was required that cost would be $800.

The Court of Appeals decision in State v. Vinje, 201 Wis.2d 98, 100, 548 NW2d 118 (Ct.Ap. 1996) compelled the application of PD 3.03 (2m). The criminal complaint alleged mutual spousal physical contact therefore each spouse became the victim of the other. Not only was SPD

required to appoint separate counsel but only half of the Elbe's monthly assets and liabilities could be offset against the $400 cost of counsel per spouse.

Should the cost of counsel ($400 per spouse) exceed the available assets there is indigence. PD3.01. The case life is four months. PD3.03(4). Over a four month period, should available assets exceed $400 by $100 dollars or less the defendant is fully indigent. PD3.038(1)(a). If the margin is between $100.01 and $399.99 the defendant is partially indigent. PD3.038(1)(b). If partially indigent SPD must appoint counsel. PD3.04(1).

The defendants would subpoena SPD to the June 6, 2016 hearing. (15-1)(20-1) The SPD file has been purged. (18)(23) SPD apparently applied the entire spousal assets and liabilities separately against $400 instead of $800. (18-1)(23-1) Defendants would later argue the difference between cost of counsel being $400 or $800 would make the difference as to both defendants being partially indigent. (8-7)(13-7)

THE MOTION TO VACATE

On November 25, 2015 the defendants moved to vacate the convictions for the reason SPD wrongfully denied

counsel at PD3.04(1). (7-8)(12-13) The Elbe's also moved for judicial notice of their social security earnings records. (9-11)(14-16) A status conference was set for March 3, 2016 (13)(18). The status conference set a briefing schedule and hearing date for June 6, 2016 (14)(19).

The defense alleged SPD erred by not appointing counsel. (15)(20) The State did not provide it's brief (21)(22) to defense counsel until the actual hearing. (27-2:15-25).

THE MOTION HEARING

Defense counsel was unaware the State would argue the U.S. Constitution has been interpreted to provide the right to counsel when no jail was imposed. (27-3:5-16) The Court granted a 34 minute recess. (27-4:3) The defense maintained the real issue was if SPD erred in the mathematical calculations (27-3:20-21)(27-5:15-16). Defense counsel disagreed with the State's brief for the reason SPD eligibility controls (27-5:23-6:2). There was a Dean hearing in 1996 (27-6:15-16), however it is the SPD denial not the Dean denial which is the basis for the defense motion. (27-7:20-23).

The Circuit Court dismissed the motions as a matter of law. (27-9:18-23) Judge Screnock made no mention of the Wisconsin Constitution.

Defense counsel requested an offer of proof as to financial eligibility (27-11:4-8). That request was denied. (27-11:9) Judge Screnock was concerned the passage of time, lack of transcripts and records, made the present motion untimely. (27-11:11-15) The Circuit Court assumed the 1996 indigence hearing and SPD calculations were properly done. (27-9:24-10:10) The defense motion to take judicial notice of the Social Security earnings was denied. (27-10:23-11:2)

THE RECONSIDERATION MOTION

Since neither the State or Circuit Court considered the application of Article I Section 7 of the Wisconsin Constitution, defense counsel promptly moved for reconsideration. (19)(24) The reconsideration motion pointed out the motion to vacate was based upon the right to counsel under both the Sixth Amendment and Article I Section 7 of the Wisconsin Constitution. (7)(12) The reconsideration motion proceeded only upon the Wisconsin Constitution, citing State Ex rel Winnie v. Harris 75 Wis.2d 547, 556. (20-1)(25-1).

The state argued article I, Section 7 of the Wisconsin constitution affords no greater right to counsel then does the Sixth Amendment, and Winnie was no longer good law. (21-6)(26-6). The defendants replied by contending it was the State's burden to show Winnie had been overruled by implication. The Supreme Court of Iowa recently on the same issue held State constitutions do not always limit defendant's rights in conformity with the Federal Constitution. (22-2)(27-2)

Judge Screnock issued a Decision and Order on September 28, 2016 (23)(28). The motion for reconsideration was denied. The decision recognized two prongs. One, a bright line imprisonment in law standard, was what the defense argued. This standard was adopted by Winnie in 1977.

The other, an individualized prediction, was the Sixth Amendment standard adopted in 1979 by Scott v. Illinois. Under this standard, as long as no jail was imposed there was no previous right to counsel.

Judge Screnock concluded the 1977 Winnie decision has been overruled by implication and the bright line test did not apply in 1996. The Wisconsin Constitution provided the

same post-charge right to counsel as the Sixth Amendment. (23-5)(28-5) The Circuit Court extrapolated this interpretation to limit Winnie to the domain of Scott v. Illinois (23-6)(28-6).

The defendants have appealed from that reconsideration. (24)(29) No written order was filed concerning the June 6, 2016 hearing.

ARGUMENT

I. STATE EX REL WINNIE V. HARRIS, 75 WIS.2D 547, 556, 249 NW2D 791 (1977) HAS NOT BEEN OVERRULED THROUGH IMPLICATION OR CHANGE IN TRIAL COURT PROCEDURES.

The denial of a motion to vacate a judgment is an appealable order. Wengerd v. Reinhart, 114 Wis.2d 575, 582, 338 NW2d 861 (Ct. App. 1983). A criminal conviction obtained in violation of a defendant's constitutional right to counsel is void and can be challenged at any time. State v. Madison, 120 Wis.2d 150, 158, 353 NW2d 835 (Ct.App.1984). The standard of review of the denial of a motion to vacate is an erroneous exercise of discretion. An error of law made during a decision denying a motion to vacate can constitute an erroneous exercise of discretion. Franke v. Franke, 268 Wis.2d 360, 391, 674 NW2d 832, 2004 WI 8 ¶54 (Ct.App. 2004).

The Circuit Court committed an error of law by ruling Article I Section 7 of the Wisconsin Constitution does not provide a bright line rule all indigent defendants have the right to counsel even though no jail is imposed. This provision reads as follows: **§ 7. Rights of accused Section 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to**

demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

This provision was interpreted in State ex rel Winnie v. Harris, 75 Wis.2d 547, 556, 249 NW2d 791 (1977) to provide counsel to all indigent defendants even if no jail was imposed. The Supreme Court concluded, **"To insure the fair administration of justice we hold that whenever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration, he must be advised of his right to counsel and further advised that if he is indigent counsel will be furnished to him at public expense unless he knowingly and intelligently waives such right to counsel."** The Circuit Court ruled this holding would become inconsistent with subsequent passages by the Wisconsin Supreme Court equating the Sixth Amendment with the right to counsel under Article I Section 7.

The Circuit Court overlooked the 2011 decision of

State v. Forbush 332 Wis.2d 620, 645-647, 796 NW2d 741, 2011 WI 25 ¶43-45 (2011). In Forbush, the history behind the right to counsel was reviewed. All indigent defendants are within the ambit of Article I Section 7. **"We recognize the importance of having a robust right to counsel under Article I, Section 7, and that to be effective, this right must include the right to have the expense of counsel for indigent defendants covered by the State."** This Wisconsin tradition dating back to 1850 is recognized nationally. State v. Young 863 NW2d 249 262-3 (Iowa 2015).

The Circuit Court erred by ruling the right to counsel under Article I, Section 7 is never broader than the Sixth Amendment. State v. Novak 107 Wis.2d 31, 41, 318 NW2d 364 (1982). Some states have applied their State constitution to provide counsel for all indigents charged with crimes even if no jail results. State v. Young 863 NW2d 249, 272 (Iowa 2015). Wisconsin remains one of those states and the Circuit Court was required to follow State ex rel Winnie v. Harris, 75 Wis.2d 547, 556, 249 NW2d 791 (1977).

The reasons for the 1977 Winnie holding remain in full force and effect today. Should an indigent defendant be wrongfully denied counsel the position of the sentencing judge becomes untenable. If jail is imposed the right to

counsel is violated. If no jail is imposed to avoid that issue the District Attorney may be wrongfully denied a jail sentence. Id.

The position of the Elbes finds support in the judicial benchbook series. The Office of Judicial Education provided the First Edition in 1982 and the Second Edition in 2001. There is a disclaimer the benchbooks are not to be cited as independent legal authority. The Elbes refer to the benchbooks as evidence of routine courtroom procedures. Relevant portions are in the Appendix. (A-Ap. 133-138).

Both Editions not only cite Winnie but suggest a verbatim disclosure be made to criminal defendants. These disclosures (A.-Ap. 134, 135, 138) remain unchanged between 1982 and 2016. The disclosure specify **"Because this charge carries with it the possibility of jail time (imprisonment) . . ."** This disclosure is directly contrary to the ruling of the Circuit Court. On September 12, 1996 the Elbe's were facing jail and had the right to counsel pursuant to Article I, Section 7 of the Wisconsin Constitution.

The Circuit Court had no basis to determine there was an implied overruling without that issue even being

discussed in the cases the Circuit Court relied upon. Silver Lake Sanitary Dist. v. DNR 232 Wis.2d 217, 225, 607 NW2d 50, 2000 WI App. 19 ¶13 (Ct.App. 1999).
The Court's error is harmless if Elbe's cannot meet their burden to establish SPD eligibility. State v. Dean 163 Wis.2d 503, 513, 471 NW2d 310 (Ct. Ap. 1991).

II. THE RECORD ESTABLISHES A BASIS FOR AN EVIDENTIARY HEARING CONCERNING PD3.04(1) AS OF SEPTEMBER 12, 1996.

The Elbe's had the burden to prove they were partially indigent on September 12, 1996. Id. The Circuit Court ruled this claim not feasible due to the passage of time and lack of hearing transcripts. The good faith effort by the Elbe's to reconstruct their financial profile as of September 12, 1996 is sufficient under the circumstances. State v. Baker 169 Wis.2d 49, 78, 485 NW2d 237 (1992).

The SPD denial of September 11, 1996 was subject to de novo review by the Circuit Court pursuant to §977.06(4) 1995 Stats. State v. Kennedy 315 Wis.2d 507, 518, 768 NW2d 412, 2008 WI App. 186 ¶12 (Ct. Ap. 2008). The standard of review is whether SPD properly applied their regulations

under the proper mathematical calculations. Id. One option in 1996 was partial indigency. State v. Dean 163 Wis.2d 503, 515 n.2, 471 NW2d 310 (Ct. Ap. 1991).

SPD was required to appoint separate counsel as there is no record of a waiver of the right to separate counsel. State v. Kaye 106 Wis.2d 1, 14, 315 NW2d 337 (1982). The cost of counsel is $400 per case PD3.02(1). The recent case of State v. Vinje 201 Wis.2d 98, 100, 548 NW2d 118 (Ct.Ap.1996) made clear the interaction of §766.31(3) and PD3.03(2m) require SPD to equally divide the income and specified expenses between Mr. and Mrs. Elbe over a four month case life period. PD3.03(4).

Partial indigency occurs for each spouse when the available assets are between $100.01 and $399.99. PD3.038(1)(b). In that event there is SPD coverage. PD3.04(1).

Emory has no earnings and Paula has take home pay of $1,080 per month. PD3.03(1) A mandatory subtraction form take home pay is a statutory amount for a family of five. PD3.03(2). This amount for area one, (Dane County) is $886 per month (8-5)(13-5). Paula's net earnings are further reduced by a preexisting utility arrearage payment

plan. PD3.03(2). There was a utility arrearage of $300 being paid at $34 per month. Paula's monthly net earnings $160 per month.

The remaining assets would be one fourth of the $600 vehicle value, or $150. PD3.03(1). The total monthly available assets is $197.50, or $98.75 per spouse per month. The cost of defense is $100 per spouse per month. Both spouses are partially indigent. PD3.038(1)(b) The Circuit Court was required to order SPD coverage. PD3.04(1)

CONCLUSION

The dismissal of the motions to vacate must be reversed and these cases remanded with directions for an evidentiary hearing as to the applicability of PD3.04(1). Should defendants prevail the convictions must be vacated and the defendants allowed to withdraw their pleas. In that event defendants will seek dismissal for violation of the right to speedy trial found at the Sixth Amendment to the Federal Constitution and Article I, Section 7 of the State Constitution.

Respectfully submitted this 7th day of December 2016.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is twenty (20) pages.

Dated: December 7, 2016

/S/ Robert A. Kennedy, Jr.

Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, 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 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: December 7, 2016.

Kennedy Law Office

/S/ Robert A. Kennedy, Jr.
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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 5th of December, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

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Dated: December 7, 2016.

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