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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case Nos. 2018AP55-CR,
2018AP 56-CR & 2018AP57-CR

MARIES D. ADDISON,

Defendant-Appellant.

ON NOTICES OF APPEAL FROM JUDGMENTS OF CONVICTION AND AN ORDER DENYING POST CONVICTION MOTION ORDERED AND ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, BRANCHS 6 AND 28, CIRCUIT JUDGES ELLEN R. BROSTROM AND MARK A. SANDERS PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN NOT DISMISSING THESE CASES BECAUSE OF A VIOLATION OF ADDISON'S RIGHT TO A SPEEDY TRIAL?

The trial court answered this question in the negative.

II. DID THE TRIAL COURT ERR BY DENYING ADDISON'S REQUEST FOR NEW COUNSEL AND FORCING HIM TO PROCEED *PRO SE* WITHOUT A SUFFICIENT FINDING THAT ADDISON COULD REPRESENT HIMSELF?

The trial court answered this question in the negative.

III. DID THE TRIAL COURT ERRONEOUSLY DEPRIVE ADDISON OF HIS RIGHT TO RELIGIOUS FREEDOM DURING TRIAL BY BANNING ADDISON'S BIBLE FROM THE COURTROOM?

The trial court answered this question in the negative.

ARGUMENT.

I. THIS CASE SHOULD BE DISMISSED BECAUSE ADDISON'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

A. *Standard of Review and Applicable Law*

The parties agree on the standard of review and applicable law on this issue (pages 8-9 of State's brief).

B.. Addison was deprived of his right to a speedy trial.

Addison was confined after being unable to post bail on March 8, 2011 (A135). Addison demanded a speedy trial on March 15, 2011 (A136). His trial began on August 13, 2012 (A148: 47). Per timeanddate.com, confinement time prior to the commencement of trial was 524 days and not 539 days as stated in Addison's brief-in-chief (see State's brief on page 10 for State's comment). Clearly, the substantial delay, even as recalculated as 15 days shorter, qualifies as presumptively prejudicial as both sides agreed (p. 10 of State's brief). .

The second element is the reason advanced for the delay. The State claims it was not "extraordinary" given the number of charges and multiple victims (page 11 of State's brief) compared with other cases in which that length of time was found constitutional.

The "ordinary demands of the judicial system" is the State's argument for justifying much of the delay (p. 12 of State's brief). Addison disagrees that period of March 7, 2011 to May 31, 2011 should not be counted against the State. Attorney Tishberg withdrew from the case on May 16, 2011 (A140) but new counsel appeared with Addison on May 31, 2011 (A141) and received discovery from Tishberg later that day. The delay due to the substitution of counsel was fairly short. During this same period the State filed one additional cases (11 CF 1664) against Addison on April 15, 2011 (B1). It filed a third one (11 CF 2881) on June 21, 2011 (C1). More than three months after the original complaint in 11 CF1079, the State filed its third case arising out of a related investigation. Even if the reason was the availability of resources to the State, it was the State's choice on allocating them that led to the delay. That period of time (85 days or 2 months, 24 days) should count against the State.

Addison's actions after his initial speedy trial demand did not weaken his claim for a speedy trial. Nothing required Addison to reiterate his speedy trial demand after his first attorney withdrew (p. 14 of State's brief). There were delays that his counsel requested due to the volume and timing of electronic

discovery provided by the State. However, those were a reaction to the bureaucratic inertia of the State in providing discovery and should not be counted against Addison.

Finally, the last factor is whether the delay resulted in prejudice to Addison. Addison's offer of proof was that, "*According to jail medical records, while Addison was incarcerated in the Milwaukee County Jail, he suffered from back pain, tinea pedis, possible ulcers , situational depression and athletes foot. Addison was observed by correctional health staff frequently making references to God in an unusual manner."* This was sufficiently detail to amount to more than an unsupported assertion as argued by the State (p. 16 of State's brief). The trial court did not address this offer of proof. There was no requirement to attach the records themselves to the post conviction motion.

Under the totality of the circumstances, Addison was prejudiced by delays in the trial for over 15 months that were not of his making. These cases should be dismissed.

II. JUDGE DALLET ERRONEOUSLY EXERCISED HER DISCRETION IN DENYING ADDISON'S REQUEST FOR NEW COUNSEL AND FORCING HIM TO PROCEED *PRO SE* WITHOUT A SUFFICIENT FINDING THAT ADDISON COULD REPRESENT HIMSELF.

A. Standard of Review and Legal Principles

The State and Addison agree on the applicable law and standard of review. (pages 22-24 of State's brief).

B. The Trial Court Forced Addison to Represent Himself or Be Represented by an Attorney with Whom Communication Had Broken Down.

Attorney DePeters had represented Addison since May 2011. At the hearing on July 24, 2012 (A147), Judge Dallet noted that the trial was scheduled for August 13, 2012 and had been adjourned 4 times (A147: 3). Addison complained that DePeters had not pursued leads in the case and got snappy a lot (A147: 3). She had not pursued missing evidence (A147: 3). DePeters stated that she attempted to review Back Page ads with Addison and he yelled at her (A147: 5). Addison also filed a complaint with OLR (A147: 5) . DePeters did not want to audition her cross examination for Addison (A147: 5). DePeters asked Addison to write her a letter about things but he had not (A147: 6). Addison was uncooperative (A147: 6). DePeters denied being snappy and Addison denied being noncooperative (A147: 7-8). It is clear there was a breakdown of communications.

While this was not as severe as the breakdown in *State v. Jones*, 2007 WI App 248, 306 Wis. 2d 340, 742 N.W.2d 341 cited on page 16 of Addison's brief in-chief and discussed by the State on page 25 of the State's brief, the *Jones* principle was clear. Lack of attorney-client communication can arise (and

frequently does) from problems other than physical impairments. Addison's complaint was his first one about his attorney and did not appear to be a pattern.

After Judge Dallet stated that "we're gonna have a trial on August 13th," Addison stated that "I'll represent myself then" (A147: 13). In response to a question from Judge Dallet about whether he "had given this any thought", Addison responded that, "If she represents me I'm gonna be convicted. I'm not gonna be convicted." Dallet then went through a colloquy with Addison regarding Addison's understanding of the charges and penalties, his age and education, his understanding of the court proceedings[1] and rules of evidence[2]. In response to a question regarding whether Addison understood a lawyer knew more about defenses and strategies than he did, Addison stated that. "I need a lawyer that cares about me and I know that can win the case (A147: 21). In response to the court's question about knowing that if Addison did not have an attorney that no one else would protect his rights, Addison replied, ""I have somebody here to protect me and you better know his name is Jesus Christ…You just can't see him. I need an attorney who cares (A147: 22). When prompted by Judge Dallet, Addison agreed with the court he wanted to give up his right to an attorney and exercised his right to represent himself (A147: 22). Addison then renewed his criticism of Attorney DePeters for depicting him as a monster and getting "real snappy" (A147: 23). Addison stated that he had just made up his mind then to give up his right to an

[1] Addison's said he did "somewhat." (A147: 20).
[2] Addison stated he did not understand them but "I can learn." (A147: 21).

attorney then because he felt he had no choice (A147: 25). Addison's choice was "to give up his right to Miss DePeters as my attorney." (A147: 26).

Judge Dallet found that Addison had the ability to represent himself and understood the disadvantages of self-representation (A147: 26).

What Judge Dallet did not consider was that Addison had not previously discharged counsel.[3] His request to represent himself was clearly based upon Judge Dallet's initial refusal to let Attorney DePeters withdraw and refusal to allow new counsel to be appointed by the State Public Defender (SPD) (A147: 25). While Addison had technical school training beyond high school (A147: 19), he also was inexperienced and uneducated in legal matters (A147: 20-21, 34-36). He made delusional statements about Jesus serving as Addison's attorney (A147: 22). The court made no inquiry into Addison's repeated references to Jesus Christ (A147: 22). Allowing appointment of a new attorney would result in the scheduled trial three weeks from the hearing being delayed. But there was time for the State to notify witnesses of the delay and for the court to schedule new matters to fill up the time slot. Sometimes insuring a fair trial has costs.

Judge Dallet's finding that Addison had the ability to represent himself and made his choice freely and voluntarily (A147: 26) was not supported by the evidence in the record. Addison's request to represent himself was an impulsive

[3] Attorney Tishberg withdrew for economic reasons, not substantive differences with Addison as implied on page 25 of State's brief. While lack of prior discharges of counsel does not entitle a defendant to discharge counsel at will, it is an important factor to consider.

reaction to the court's denial of Addison's request for new counsel. To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. (citations omitted) *State v. Klessig,* 211 Wis.2d 194, 206 564 N.W.2d 716 (Wis., 1997). While the court went through a colloquy with Addison, the colloquy and subsequent findings did not address Addison's lack of court experience and delusional statement about Jesus.

During the trial itself, Addison continued to demonstrate his delusions about divine intervention. Addison told the court that the "blood of Jesus" was against it and Jesus was on his side (A158: 100, 117, A161: 25, 104, 117). He felt at a disadvantage without an attorney at his side (A158: 117-120). He also told the court that the Devil was alive and that the blood of Jesus was warm (A163: 212). Addison's examination of witnesses was marked by frequent objectionable questions and lack of knowledge of the rules of evidence. While Addison "learned," it was during the course of a two week trial before the jury that decided his fate.

In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a

defendant is competent to stand trial. *State v. Klessig,* 211 Wis.2d at 212. The court must consider "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *State v. Klessig,* 211 Wis.2d at 212. Addison's delusional comments about divine assistance and his attitude displayed at the July 24, 2012 hearing suggested a psychological disability. But the record does not show the court ever assessed that in a meaningful way. This was an extremely voluminous case that ended up taking over two weeks to try even though only one week had been set aside. There were vast quantities of discovery and complex legal issues. Few attorneys would be competent to represent a client in such a case much less a 28 year old lay person with minimal court experience. During the trial, Addison demonstrated that he had great difficulty even with the assistance of Attorney DePeters as standby counsel. The inquiries made by the court were insufficient. The court should order a hearing as mandated by *Klessig* to determine Addison's competency to represent himself during the August 2012 trial. A psychological examination may be warranted. If Addison is found not to have been competent to represent himself then, a new trial must be held.

In his ruling on the post-conviction motion, Judge Sanders held that Addison's unequivocal refusal to proceed with Attorney DePeters gave Judge Dallet no choice but to question Addison about his desire to proceed *pro se* (A128:

14; App. 124). But the extensive colloquy of Judge Dallet with Addison (A128: 10-14, App. 121-124) established only Addison's conflict with DePeters, not that Addison rejected representation by counsel. It was also tainted by the court's prior refusal to adjourn the trial so that new counsel could be appointed and represent Addison.

III. THE COURT ERRONEOUSLY DEPRIVED ADDISON OF HIS RIGHT TO RELIGIOUS FREEDOM DURING TRIAL BY SEIZING ADDISON'S BIBLE.

A. Standard of Review and Applicable Law

The parties agree on the applicable standard of review and law (pages 35 and 36 of State's brief).

B. *It was an erroneous exercise of discretion for the trial court to deprive Addison of his ability to consult religious books during trial.*

At the beginning of court on August 22, 2012, Judge Brostrom permitted the deputies to remove Bibles and other religious books from Addison (A161: 3-10). Certainly, symbolism is found in and around our courtrooms, and trial courts have the discretion to allow displays so long as they are not prejudicial to a litigant. See *Davis v. State*, 223 S.W.3d 466, 475 (Tex.App.-Amarillo 2006, pet. ref'd) (no prejudice shown in trial court's allowing trial spectators to wear medallions bearing photograph of victim police officer); *Green v. State*, 209 S.W.3d 831, 834 (Tex.App.-Amarillo 2006, pet. ref'd).

Here Judge Brostrom did not explain how Addison's possession of a Bible interfered with the compelling interest in conducting an orderly, impartial trial. After all, litigants wear clothes in court they ordinarily do not to impress a jury. While having a Bible visible to the jury made more of a statement about character than a suit and tie, it did not disrupt the presentation of evidence.

The court not only banned the Bible from the defendant's table but from the courtroom itself It did not consider whether to allow Addison to hold the Bible in his lap, cover the title or otherwise conceal it from the jury. The court could have warned Addison that if he went beyond the court's limits, it would publicly admonish him in front of the jury. Addison's failure to fully comply with the court's directive on the fifth day of trial (outlined on page 31 of State's brief) was no reason to completely deprive Addison of the comfort that the Bible apparently gave him in being able to demonstrate the "real me." (A161: 5).

Interference with a litigant's fundamental right is structural error which does not require a showing of prejudice. *State v. Pinno*, 2014 WI 74, ¶53, 356 Wis.2d 106, 850 N.W.2d 207. The State did not clearly disagree with the contention in its brief (page 39 of State's brief). Addison's convictions should be reversed.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Addison requests that this court dismiss these matters or grant him a new trial.

Dated this 3rd day of August, 2018

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif spaced font. This brief has 2691 words, including certifications

Dated this 3rd day of August 2018

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of 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 3rd day of August 2018

LEN KACHINSKY