STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001999-W

STATE OF WISCONSIN EX. REL.
ANTONIO S. DAVIS,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY AND
HONORABLE ELLEN K. BERZ,

Respondents.

BRIEF OF PETITIONER-PETITIONER

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Petitioner-Petitioner

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

When the court sua sponte entered a plea on behalf of an unrepresented defendant awaiting appointment of counsel before giving notice of assignment of judge, did that procedure result in a government-created obstacle that deems Mr. Davis' request for substitution timely?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Given this Court's grant of review, oral argument and publication are warranted.

STATEMENT OF FACTS AND THE CASE

The state filed a complaint on August 30, 2022, 15 days after the alleged incident, which charged Mr. Davis with misdemeanor battery and disorderly conduct. (Pet. App. 4). The complaint does not specify what judge was assigned to this case. (Pet. App. 4-7).

Mr. Davis appeared in intake court for his initial appearance on August 30, 2022, and a signature bond was set by a court commissioner. (Pet. App. 8-10, 27). At the initial appearance, the court entered a plea on Mr. Davis' behalf. (Pet. App. 26-28). A Public Defender assigned to cover intake duty appeared with Mr. Davis for the limited purposes of arguing bail and receiving the criminal complaint—no attorney was retained by

or appointed to represent Mr. Davis at this hearing. (Pet. App. 26-28). However, Mr. Davis had previously applied for counsel through the SPD office and was determined to be eligible for an attorney. Only after entering a plea on Mr. Davis' behalf did the commissioner set the case for further proceedings in front of Judge Ellen Berz and provide notice of hearing with this information to Mr. Davis. (Pet. App. 11, 26-28).

Mr. Davis was not represented by counsel after the initial appearance until Attorney Breun[1] was appointed on November 3, 2022. (Pet. App. 12). Counsel filed a request for substitution with an accompanying motion explaining the status of counsel and the case on November 9, 2022. (Pet. App. 13-16). The court, in a one-word decision, denied the request as untimely on the same day. (Pet. App. 17-19).

Attorney Breun filed a petition for supervisory writ in the court of appeals. (Pet. App. 29). The court of appeals denied the petition. (Pet. App. 20-25). Davis petitioned this Court for review this Court accepted the petition. (Pet. App. 34-35).

[1] While there was no OAC filed at the initial appearance, it just so happened that the intake duty attorney was later appointed to represent Mr. Davis. (Pet. App. 12, 27). Intake counsel's limited appearance and subsequent appointment are merely a coincidence, as internal procedures regarding eligibility and conflict checks preclude SPD from filing an OAC in advance or at the time of the intake proceedings.

ARGUMENT

I. This Court should find Mr. Davis' substitution request timely

A. Introduction

While awaiting appointment of counsel to which he was constitutionally entitled, Mr. Davis was deprived of the opportunity to exercise his statutory right to substitution by no fault of his own. At his first court appearance in intake court, a court commissioner informed Mr. Davis of the charges, set bail, and entered a plea on his behalf before giving him notice of the assigned judge. (Pet. App. 27-28). Despite qualifying for public defender representation, no attorney was assigned or appointed to Mr. Davis' case at the time of the initial appearance. (Pet. App. 26-28). No attorney was appointed for more than 60 days after, despite Mr. Davis actively seeking counsel immediately after his arrest. (Pet. App. 12, 15). Additionally, the court commissioner did not advise him of the loss of his statutory right to substitution by the court entering a plea on his behalf (or that the local rule extended this deadline by 20 days). (Pet. App. 32-33).

This Court has stated that the purpose of Wisconsin Statute § 971.20 is to afford a defendant an opportunity to exercise their right to substitution intelligently. *Baldwin v. State*, 62 Wis. 2d 521, 531, 215 N.W.2d 541 (1974). Wisconsin appellate courts have also acknowledged that there are exceptions to the deadline for filing a substitution request when

"a government-created obstacle" interfered with a defendant's opportunity to timely file for substitution. *State v. Zimbal,* 2017 WI 59, ¶¶ 41, 46, 375 Wis. 2d 643, 896 N.W.2d 327 (citing *Baldwin*, 62 Wis. 2d at 530-532) (court calendaring problem); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty*., 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985) (procedures for misdemeanor traffic cases); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cty., Branch 2*, 159 Wis. 2d 783, 790, 464 N.W.2d 853 (Ct. App. 1990) (court's internal procedures).

Despite this Court's ruling that Wis. Stat. § 971.20 is not to be strictly adhered to when there is a government-created obstacle that interferes with the ability to file a timely substitution request, the circuit court refused to honor Mr. Davis' request, and rejected it as untimely.[2]

There are two alternative legal analyses that should result in this Court finding Mr. Davis' request timely and that the circuit court erred when it denied Mr. Davis' request for substitution of judge.

First, this Court should find that the intake court's sua sponte arraignment, which happened before the appointment of counsel or notice of assigned judge, was a "government-created obstacle" that impeded Mr. Davis' ability to exercise the right of

[2] Mr. Davis does not dispute that his request was made outside of the statutory time limits and outside of the relaxed time limits in the Dane County Local Rule. This distinction does not and should not matter.

substitution. This Court could find the substitution request timely on this legal basis by applying longstanding precedent and reasonably construing Wis. Stat. § 971.20 to give effect to the legislative intent to ensure the constitutional right to a fair trial. *See Baldwin v. State*, 62 Wis. 2d at 529-30.

Second, this Court should find that equitable tolling applies because the circumstances were beyond Mr. Davis' control—the delay in appointment of counsel and the court's entry of a plea on his behalf resulted in a statutorily untimely substitution request. *State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292.

B. Standard of Review

The application of Wis. Stat. § 971.20 presents a question of law this Court decides independently of the circuit court and the court of appeals but benefiting from their analyses. *State v. Harrison*, 2015 WI 5, ¶ 37, 360 Wis. 2d 246, 858 N.W.2d 372. Wisconsin Statute § 971.20 has been referred to as the "criminal peremptory substitution statute, the peremptory right to substitution, or the peremptory right to substitution statute." *Id.* ¶ 2.

C. This Court should find that there was a government-created obstacle that prevented Mr. Davis from filing a statutorily timely substitution request.

This Court should reasonably apply Wis. Stat. § 971.20 and hold that Mr. Davis' substitution request was timely because his failure to comply with the statutory deadline was the result of a government-created obstacle. The government-created obstacle resulted when the court, sua sponte, at initial appearance, entered a plea on Mr. Davis' behalf before he had appointed counsel and before he had notice of the assigned judge. This action immediately triggered Wis. Stat. § 971.20's deadline to file a request for substitution.

As a preliminary matter, statutory pretrial criminal procedures do not require simultaneous initial appearance and arraignment. Sections 970.01 and 970.02 set forth the procedure to follow for preliminary matters in criminal court. Section 972.01 addresses initial appearances, and requires the judge, in a misdemeanor case, to ensure the defendant appears in court and is informed of the charges against him, informed of the right to counsel, informed of his right to bail, and to set the case for trial when requested by the defendant, and to order (in some circumstances) the defendant to be fingerprinted and

photographed or DNA to be taken. (Wis. Stat. §§ 970.01, 970.02 (2020-2021)).[3]

Procedures regarding arraignment are found in Wis. Stat. § 971.05. The section allows for arraignment to occur in the same court that conducted the initial appearance, but does not require the court to conduct both an initial appearance and arraignment at the same hearing. *See* Wis. Stat. § 971.05 (2020-2021). While Wis. Stat. § 971.06, regarding pleas, requires, where the defendant stands mute, the court enter a plea on their behalf, the preceding statutory sections (970.02, 970.05, 971.06) again do not require the court to conduct an arraignment at the same time as the initial appearance.

The final relevant section is Wis. Stat. § 971.20, which requires the substitution of judge request to be made "with the clerk before making any motions to the trial court and before arraignment." (Wis. Stat. § 971.20 (2020-2021)). This section again does not require an initial appearance[4] to happen at the same hearing as arraignment.

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[3] The remaining subsections in Chapter 970 deal exclusively with preliminary examinations in felony cases, which are not applicable to Mr. Davis, as he was charged with a misdemeanor.

[4] Because this case was charged as a misdemeanor, Mr. Davis given a signature bond, counsel was appointed in time for the very next scheduled court date, and no request for speedy trial was made during the relevant time period, the considerations weighing against adjourning an initial

The circuit court was not required to simultaneously conduct an initial appearance *and* an arraignment at the same hearing. The court could have simply scheduled this case for an adjourned initial appearance to address the status of counsel, which would have allowed an opportunity for consultation with appointed counsel regarding the potential for substitution of judge in a timely manner under the statute. Because the court's decision to, sua sponte, proceed with arraignment at the same time as the initial appearance, where Mr. Davis was unrepresented and without notice of the assigned judge by no fault of his own, this Court should, consistent with long-standing precedent, relax the strict statutory time limit and deem Mr. Davis' substitution request timely.

The State of Wisconsin recognizes that "every accused is entitled to a fair trial" by an impartial judge "without any showing of any prejudice in fact." *Baldwin v. State*, 62 Wis. 2d at 530. For more than four decades, Wis. Stat. § 971.20 has consistently and repeatedly been construed reasonably, rather than strictly, to give "effect to the predominant intention of the legislature expressed in the section to afford a substitution of a new judge assigned to the trial of that case." *Id*. (Internal quotations omitted). Wisconsin appellate courts have recognized the fundamental unfairness of applying Wis. Stat. § 971.20 deadlines strictly when "a strict construction makes it

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appearance as discussed in *State v. Lee*, 2021 WI App 12, 396 2d. 136, 955 N.W.2d 424, are not applicable here.

impossible to obtain the objective of this section and would frustrate the objective of the statute." *Id*.

In *Baldwin*, the court addressed Milwaukee County's calendaring system in which the trial judge was not assigned until after arraignment, making it impossible for a defendant to file a timely and intelligent substitution request pursuant to Wis. Stat. § 971.20(4). *Id*. at 530-31. The state argued that Wis. Stat. § 971.20 precludes a defendant, no matter how extenuating the circumstances, from asserting the right to substitute a judge if the request for such substitution is not timely under the statute. *Id*. at 529. The court rejected the state's strict and unreasonable construction of the statute. *Id*. at 529-32.

Rather, the court held that "arraignment," for the purposes of Wis. Stat. § 971.20, would not be completed until the trial judge confirmed the plea and set a trial date. *Id*. at 530. "This interpretation witnesses and gives effect to the predominant intention of the legislature expressed in the section to 'afford a substitution of a new judge assigned to the trial of that case.'" *Id*. This was especially important given the judge who handled the arraignment was not the same judge who presided over the trial, thus strict compliance with the statute was not mandated. ***Id.*** at 529-530.

In *Clark v. State*, 92 Wis. 2d 617, 627, 286 N.W.2d 344 (1979), the court acknowledged the "vagaries of practice and procedure" that necessitate the reasonable application of Wis. Stat. § 971.20 to

ensure a person's right to a fair trial is preserved. The case involved a defendant's substitution request that was filed *after* he filed a motion to quash the indictment but before his arraignment. *Id*. at 622-23. The court interpreted the statutory language to unquestionably require a substitution request be filed before the filing of a motion or the arraignment, whichever event occurs first. *Id.* at 626. Under that plain, if strict, reading of the statute, the defendant's request was technically untimely. *Id*.

Nevertheless, the court immediately turned to whether the defendant's request for substitution should actually be considered "untimely." *Id*. at 628. In doing so, the court noted that it views the defendant's ability to exercise his right of substitution *intelligently* as the key to the statutory right, which preserves the right to a fair trial. *Id*. at 627-28.

While the court ultimately concluded that Clark withdrew his request for substitution by inaction, *id*. at 629-30, the court reasoned that:

> Recognizing the substitution request as timely under these facts, would give effect to the legislative intent expressed in sec. 971.20 and would not enable a defendant to use the request as a technique to disrupt scheduled calendaring or delay the scheduled trial.

Id. at 628.

The mandate for reasonable application of Wis. Stat. § 971.20 was again followed in *State ex rel Tessmer v. Circuit Court Branch III*, 123 Wis. 2d 439, 367 N.W.2d 235 (Ct. App. 1985) and *State ex rel. Tinti v. Circuit Court for Waukesha County, Branch 2*, 159 Wis. 2d 783, 464 N.W.2d 853 (Ct. App. 1990).

In *Tessmer***,** the court applied the *Baldwin* rationale to a defendant's substitution request, which would have been untimely under a strict application of the statute. 123 Wis. 2d at 443. There, the defendant appeared without appointed or retained counsel at his initial appearance and had not previously been given any notice of an assigned trial court judge. At that time, a court commissioner entered a not guilty plea for him and he was given written notice of a pretrial date containing notice of the assigned trial court judge. *Id.* at 441. The defendant subsequently retained counsel, who filed a request for substitution seven days after the initial appearance. *Id*. The circuit court denied the request as untimely.

The *Tessmer* court reversed, holding that a literal and strict interpretation of the substitution statute would interfere with a defendant's right to "intelligently exercise the right of substitution" where there was a lack of any evidence that the proceedings were disrupted or delayed by the defendant. *Id.* at 443-44.

In *Tinti,* the court of appeals addressed an intake system that did not provide adequate notice of assignment of judge in advance of arraignment. 159 Wis. 2d at 788-790. The court found that strict adherence of Wis. Stat. § 971.20's applicable deadlines where a criminal defendant is arraigned before he receives notice of the assigned judge would interfere with the defendant's right to intelligently exercise the right of substitution. *Id.* at 788.

There, even though the defendant was represented by a veteran local attorney who failed to comply with the statutory deadline, the court held that the applicable "filing deadline of the statute must be relaxed to allow for an intelligent opportunity to exercise the right of substitution." *Id.* at 790.

Most recently, in *State v. Zimbal*, 2017 WI 59, ¶ 40, 375 Wis. 2d 643, 896 N.W.2d 327, this Court held that the technically-untimely substitution request was timely filed where a government-created obstacle denies a defendant the opportunity to file a request for substitution. There, Zimbal appeared with limited-scope counsel in front of the circuit court after being granted a new trial in the court of appeals. *Id.* ¶ 36. While making an oral request for substitution through the SPD attorney that appeared only for the status hearing, the court instructed Zimbal to wait for appointed counsel to make the request. *Id.,* ¶¶ 9-12. Less than 20 days after counsel was appointed, Zimbal filed a written request for substitution under Wis. Stat. § 971.20(7). *Id.* ¶ 14. The circuit court denied

the request as untimely under the strict, statutory 20-day timeline in Wis. Stat. § 970.20(7). *Id.*

This Court reversed, again recognizing the need to dispatch with strict adherence to the statutory time limit in order to effectuate legislative intent where a government-created obstacle—the delay in appointment of counsel and the court's directive to wait for the same before filing a substitution request—prevented Zimbal from complying with the strict statutory deadline for filing a substitution request. *Id.* ¶ 40. This Court held that Zimbal, by no fault of his own, was unable to intelligently exercise his right to substitution because of a government-created obstacle. The Court recognized that while the request was technically untimely, the request came 17 days after the appointment of counsel, it was reasonable to restart the 20-day deadline once counsel was appointed. *Id.* ¶ 52.

To hold that Mr. Davis' substitution request was timely, this Court need only apply the same law it has done time and again, and reasonably apply Wis. Stat. § 971.20. Strict adherence to the statute here defeats any ability for Mr. Davis to exercise the right to substitution in an intelligent manner.

An intelligent exercise of the right to substitution includes the ability to confer with appointed or retained counsel regarding whether to exercise the right of substitution. Dane County Local Rule 208 necessarily acknowledges the rule against strict adherence to Wis. Stat. § 971.20 in

circumstances like the one presented here. (Pet. App. 32-33). However, the Local Rule fails to account for the court's unnecessary entry of Mr. Davis' plea, the fact that Mr. Davis was unrepresented at the time the court entered his plea, and the fact that Mr. Davis was not informed of the assigned judge until after the arraignment.

As in prior cases in which strict adherence to Wis. Stat. § 971.20 was rejected, the court was responsible for a government-created obstacle. By choosing to proceed in a manner that was not required by statute prior to providing the notice of assigned judge, the court created an obstacle whereby Mr. Davis, an unrepresented defendant, was deprived of any opportunity to intelligently exercise his right to substitution.

Additionally, because the circuit court entered a plea on Mr. Davis' behalf before the appointment of counsel and before Mr. Davis was notified of the assigned trial judge, Mr. Davis could never have complied with the strict statutory deadline.

Finally, there is no evidence in this record that Mr. Davis was responsible for any of the potential delays or directed the court to proceed to arraignment instead of adjourning for status of counsel. In fact, Mr. Davis did everything in a timely manner: he applied for counsel at the earliest possible time and appeared in person for his scheduled initial appearance. Mr. Davis did not request a trial date, nor he did ask the court to proceed to arraignment.

Additionally, within one week of the appointment of counsel, Mr. Davis filed a formal substitution request, thus ensuring that the request would not cause any undue delay or otherwise disrupt the court's calendar. This Court should conclude, under these facts, that Mr. Davis' substitution request was timely.

D. The equitable tolling rule should apply to Mr. Davis' request for substitution because forces beyond his control precluded a timely request through counsel either before arraignment or within 20 days of arraignment by Local Rule.

Even if this Court determines that the request was untimely under strict adherence to Wis. Stat. § 971.20, Mr. Davis asks this Court to find that equitable tolling applies to his request for substitution. This Court should toll (1) the time from the court conducting an initial appearance and arraignment until the next court date on November 6, 2022, or toll (2) the Dane County Local Rule allowing an additional 20 days to file a substitution request after arraignment until Mr. Davis was appointed counsel.[5]

"Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed." *Zimbal*, 2017 WI 59, ¶ 64 (Roggensack, C.J.,

[5] Mr. Davis' counsel filed the request for substitution within a week of appointment. (Pet. App. 12-16).

concurring) (quoting 51 Am Jur. 2d, Limitations of Actions §152 (2017).

"Wisconsin appellate courts have tolled statutory deadlines as an equitable solution for harsh results that would flow from a required action outside of the defendant's control." *Id.* ¶ 66 (citations omitted). In doing so, the court has recognized the fundamental unfairness of enforcing filing deadlines when a *pro se* defendant or prisoner is dependent on a third party to finalize the filing. When circumstances beyond the control of a litigant result in belated filing of court documents, the courts have applied an equitable "tolling rule." In *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 18, 244 Wis. 2d 177, 629 N.W. 2d 17, the court held that a statutory deadline must be tolled when circumstances beyond the *pro se* prisoner's control prevented him from meeting the statutory deadline. Specifically, the court tolled the deadline while the inmate awaited a Wisconsin Department of Justice certification. *Id.*

The tolling rule was adopted by the Wisconsin Supreme Court in *State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292. In that case, this Court held that its 30-day deadline for receipt of a petition for review "is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing." *Id.* ¶ 32. Again, the Court tolled the statutory deadline while the *pro se* prisoner waited on the action of others over which the prisoner had no control.

Here, this Court should conclude that, because the circuit court proceeded with arraignment instead of employing another mechanism to ensure intelligent exercise of the right to substitution, and because Mr. Davis was without appointed counsel prior to arraignment, and not provided notice of the assigned judge prior to arraignment, the applicable Wis. Stat. § 971.20 deadline was equitably tolled until counsel was appointed for Mr. Davis. Thus, his request for substitution, made six days after the appointment of counsel, was timely.

Alternatively, this Court should conclude that because of the same circumstances, all of which were outside of Mr. Davis' control, the time limit under the Dane County Local Rule, allowing for a substitution request within 20 days of arraignment, was tolled until Mr. Davis was appointed counsel. Thus, his request for substitution, made six days after appointment of counsel, was timely.

Justice requires the equitable tolling of the strict statutory deadline in this case. Through no fault of his own, and as a direct result of government created obstacles, Mr. Davis lost his right to substitution simply by showing up to court and doing exactly what was expected of him. He qualified for appointed counsel and he diligently sought counsel at the earliest opportunity. The fact that no similarly harsh result would have occurred had Mr. Davis been in a position to retain counsel of his choice prior to his initial appearance demonstrates the unfairness that would result from a refusal to equitably toll the statutory

deadline in this case. The only thing Mr. Davis failed to do that related to his request for substitution was have the resources to retain counsel prior to his initial appearance. Justice does not allow for such a contrast in outcomes based merely on Mr. Davis' inability to retain counsel.

CONCLUSION

For the reasons set forth above, Mr. Davis respectfully requests that this Court grant his request for substitution.

Dated this 15th day of June, 2023.

Respectfully submitted,

Electronically signed by Kelsey Loshaw
KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Petitioner-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,965 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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 15th day of June, 2023.

Signed:
Electronically signed by Kelsey Loshaw
KELSEY LOSHAW
Assistant State Public Defender