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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP1999-W

STATE OF WISCONSIN EX. REL
ANTONIO S. DAVIS,

Petitioner,

v.

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

Respondents.

ON APPEAL FROM AN ORDER OF THE WISCONSIN COURT OF APPEALS, DIST. IV, DENYING A PETITION FOR SUPERVISORY WRIT

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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INTRODUCTION

The State of Wisconsin agrees with the brief filed by the Dane County Circuit Court and Judge Berz.[1] This case should not be here. The petitioner fails to argue, let alone meet, the supervisory writ standard. And the petitioner's new arguments are both forfeited and meritless. This case is not a good vehicle for making law.

But the State acknowledges that this Court granted the petition for review, which raised the question of when equitable relief is warranted in cases such as this—cases where a delay in getting appointed defense counsel affects a defendant's ability to intelligently exercise his or her right to substitute a judge. The State's position is that equitable relief may be warranted in some such cases, but it will depend on the facts of the case, and it is not warranted here.

STATEMENT OF THE ISSUES

Should this Court apply an equitable doctrine to hold Davis's untimely substitution request as timely?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Court Respondents that this Court should dismiss this case without rendering an opinion because it is not a good vehicle for law development. But if this Court declines to dismiss this case, the State acknowledges that oral argument and publication are customary.

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[1] When citing and referring to their brief, the State will refer to the Dane County Circuit Court and Judge Berz as "Court Respondents."

STATEMENT OF THE CASE

The Court Respondents' brief accurately and thoroughly sets forth the statement of the case.

ARGUMENT

Davis is not entitled to equitable relief because, while delays in getting appointed counsel may be relevant to whether equitable relief is warranted, Davis did not sufficiently show the requisite factors for equitable relief.

A. A supervisory writ is unsuited for considering requests for equitable relief such as exceptions to strict adherence and equitable tolling.

The fact-specific nature of equitable relief makes it unsuited for consideration in the supervisory writ context. The supervisory writ standard requires the petitioner to prove that the court violated a plain duty. *See State ex rel. CityDeck Landing LLC v. Circuit Ct. for Brown Cty.*, 2019 WI 15, ¶ 15, 385 Wis. 2d 516, 922 N.W.2d 832. And, as this Court has said, a "plain duty 'must be clear and unequivocal and, under the facts, the responsibility to act must be imperative.'" *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 80, 363 Wis. 2d 1, 866 N.W.2d 165 (citation omitted).

The fact-specific, discretionary nature of equitable relief is inherently at odds with the "plain duty" requirement for issuance of a supervisory writ. *See Sulzer v. Diedrich*, 2003 WI 90, ¶ 16, 263 Wis. 2d 496, 664 N.W.2d 641 (the circuit court's decision to grant equitable relief is discretionary).

The Court Respondents have aptly explained in their brief why Davis has not and cannot show that the circuit court violated a plain duty when it denied his substitution request. (Court Respondents' Br. 16.) The State questions whether equitable tolling or exceptions to strict adherence are ever

warranted in the context of a supervisory writ.[2] The fact-specific nature of the equitable relief is far more suited for consideration in the appeal context.

B. Equitable tolling and exceptions to the rule of strict adherence are both applied narrowly and require the claimant to show that the equitable relief is warranted in the facts of their case.

The petitioner has asked this Court to use one of two equitable theories to provide him relief—an exception to the rule of strict adherence or equitable tolling. While these two theories are distinct, they function similarly.

Nearly all the equitable relief cases involving the deadline for substituting a judge analyze whether the circumstances warrant an exception to the rule of strict adherence to the statutory language at issue. In *Baldwin*,[3] *Tessmer*,[4] *Tinti*,[5] and *Zimbal*,[6] the courts decided that the facts warranted relaxing the deadline for requesting substitution in order not to frustrate the statute's objective. The courts referenced both government-created obstacles and exceptions to the rule of strict adherence. Essentially, the courts reasoned that the facts warranted a "relaxing" or

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[2] While both *Tessmer* and *Tinti* were writ cases, *Tinti* involved a writ of prohibition, and neither case discusses the plain duty requirement for supervisory writs. *See State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty.,* 123 Wis. 2d 439, 367 N.W.2d 235 (Ct. App. 1985); *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).

[3] *Baldwin v. State*, 62 Wis. 2d 521, 215 N.W.2d 541 (1974).

[4] *Tessmer*, 123 Wis. 2d 439.

[5] *Tinti*, 159 Wis. 2d 783.

[6] *State v. Zimbal*, 2017 WI 59, ¶ 40, 375 Wis. 2d 643, 896 N.W.2d 327.

loosening of the statute's words in order to achieve its spirit.[7] Equitable relief was granted only where the claimant showed that, under the facts of the case, it was impossible for them to comply with the applicable deadline. *See State v. Zimbal*, 2017 WI 59, ¶ 40, 375 Wis. 2d 643, 896 N.W.2d 327; *State ex rel. Tessmer c. Cir. Ct. Branch III, In & For Racine Cty.*, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cty.*, 159 Wis. 2d 783, 788, 464 N.W.2d 853 (Ct. App. 1990).

Chief Justice Roggensack's concurrence in *Zimbal* discussed a different framing from an exception to strict compliance. She argued that the doctrine of equitable tolling is a better remedy than simply "'relax[ing]' the rule of strict compliance." *Zimbal*, 375 Wis. 2d 643, ¶¶ 54–55 (Roggensack, C.J., concurring). Similar to relaxing the statutory requirements, 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." 51 Am. Jur. 2d *Limitations of Actions* § 153 (2017). "Equitable tolling focuses on whether there was excusable delay by the plaintiff." *Id.* Equitable tolling has been applied in cases where "a claimant has made a good faith error and there is an absence of prejudice to others if it is applied." *Zimbal*, 375 Wis. 2d 643, ¶ 65 (Roggensack, C.J., concurring).

In theory, the doctrine of equitable tolling would not be limited to situations where it was literally impossible for a

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[7] *See Zimbal*, 375 Wis. 2d 643, ¶ 40 ("This limited exception comports with our prior case law allowing for an exception when a government-created obstacle prevents a defendant from complying with the statutory deadline."); *Tessmer*, 123 Wis. 2d at 443 (holding that, under the specific facts of that case, a strict construction of the statute would defeat the obvious legislative purpose); *Baldwin*, 62 Wis. 2d at 530 ("A strict construction makes it impossible to obtain the objective of this section and would frustrate the objective of this statute.").

defendant to comply with a statutory deadline or local rule. But to warrant equitable tolling, the defendant's delay would have to be "excusable" and made in good faith, and there could not be prejudice to others.

Both equitable doctrines function similarly and are applied very narrowly to the facts of the specific case. In *Zimbal*, for example, the Court expressly limited its holding to "the circumstances presented" there and concluded that "when a defendant follows a circuit court's instruction to defer filing a request for substitution of a judge until after counsel is appointed, that strict compliance with the 20 day deadline for filing a request for substitution after remittitur is not warranted." *Zimbal*, 375 Wis. 2d 643, ¶ 53.

There may be cases where a defendant does not get appointed counsel until after the applicable deadline for substituting judges has run, and equitable relief may be warranted in order to effectuate the objectives of the substitution statute. Or there may be cases where a defendant's delay is excusable for other reasons, and tolling would not prejudice the State. But, as the courts in *Zimbal*, *Tessmer* and *Tinti* have shown, any such relief should be based on the specific facts of that case, and the defendant must show that the relief is warranted under those specific circumstances.

C. Davis has not established that he is entitled to equitable relief.

Davis argues that he was entitled to equitable relief because he did not get appointed counsel until after the

substitution deadline had run. But Davis's position is not supported by the law, and it ignores several critical facts.[8]

First, none of the cases Davis cites hold that delay in getting counsel by itself warrants equitable relief.

In *Tessmer* and *Tinti*, the government-created obstacle that triggered relief was a structural issue with calendaring that made it impossible for the defendant to know the judge before the time to request substitution had passed. *See Tessmer*, 123 Wis. 2d at 443; *Tinti*, 159 Wis. 2d at 789–90. And in *Zimbal*, the government-created obstacle was the circuit court's telling the defendant to wait and file the substitution request until after he had counsel. *Zimbal*, 375 Wis. 2d 643, ¶¶ 40, 46. In *Zimbal*, it was impossible for the defendant to comply with both the court's order and the applicable substitution deadline.

In Davis's case, in contrast, no government-created obstacle made it impossible for Davis to make his substitution request in a timely manner. A defendant can make a request even while he is pro se. And Davis was not even pro se; he had intake counsel at the time he learned who his judge would be, and he then had 20 days after that to request substitution. Davis cannot show that he is like the defendants entitled to equitable relief in *Zimbal*, *Tessmer,* and *Tinti*.

And while Davis might have been able to demonstrate to the circuit court that equitable tolling was warranted, he

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[8] In his brief before this Court, Davis makes a completely new argument, arguing that the government-created obstacle warranting equitable relief was the fact that he was arraigned at his initial appearance. (Davis's Br. 10.) As the Court Respondents argue in their brief, this argument is forfeited because it was not raised below. (Court Respondents' Br. 12.) And since this Court granted review on a different issue—namely the alleged government-created obstacle caused by the SPD shortage—the State is limiting its position to the delay in receiving appointed counsel.

did not attempt to do so. To justify equitable relief under a tolling theory, Davis needed to present facts showing that he excusably did not substitute on his own, and that his intake counsel could not have made a request for him once Davis learned who the judge would be.

Davis also ignores the local rule that set his actual deadline for substitution. He focuses on the statutory deadline, which was at issue in *Zimbal*, *Tessmer,* and *Tinti*. But when applying equitable doctrines, a court must look at "all the facts and circumstances," not just the ones in the movant's favor. *See Beidel v. Sideline Software, Inc*., 2013 WI 56, ¶ 30, 348 Wis. 2d 360, 842 N.W.2d 240.

The record here shows that the local rule extended Davis's substitution deadline 20 days from the initial appearance. (Pet-App. 33.)[9] In fact, when he made his substitution request, Davis acknowledged that it was the local rule, not the statute, that set the relevant deadline. (Pet. Rev. App. 11.) So, since Davis had 20 days past his arraignment to file his request, it was not impossible for him to make a timely request for substitution; his case is thus distinguishable from the case law he relies on. *See Tessmer*, 123 Wis. 2d at 443; *Tinti*, 159 Wis. 2d at 788. None of the cases he cites stand for the proposition that lack of appointed counsel, standing alone, is enough to justify relief.

In any case, Davis has failed to develop a factual case that he is entitled to equitable relief, regardless of the narrow posture of this case.

[9] "Pet-App." references the appendix to Davis's opening brief in this Court, while "Pet. Rev. App." references the appendix to the petition for review.

CONCLUSION

The State respectfully requests that the Court dismiss this appeal, or alternatively, affirm the court of appeals' denial of Davis's petition for supervisory writ.

Dated this 6th day of September 2023.

Respectfully submitted,

Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,965 words.

Dated this 6th day of September 2023.

Electronically signed by:

Abigail C.S. Potts
ABIGAIL C. S. POTTS

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of September 2023.

Electronically signed by:

Abigail C.S. Potts
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