STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001999-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, District IV,
Denying a Petition for Supervisory Writ

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Respondents[1] briefs largely assert the same positions. First, Davis will address the Respondents' attempt to distinguish between the statutory deadline and the local rule. Second, Davis will discuss the attempt to incorrectly curtail when denial of substitution requires a writ. Finally, Davis will demonstrate how this case requires this Court to grant the writ based on the appropriate legal standards.

I. Mr. Davis has not forfeited any argument.

Both Respondents ask this Court to dismiss as they claim Davis has abandoned his initial argument from the petition for review and is now advancing a different legal argument. (Respondent Berz's Brief, 13; State's Brief, 9-10).

Davis is not arguing a new legal theory—he has consistently argued that §971.20 must be interpreted and applied in a reasonable way to allow for an equitable and intelligent exercise of the statutory right to substitution.

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[1] Wisconsin DOJ represents both Judge Berz and the State of Wisconsin. Davis replies to both and refers to Judge Berz as "Respondent Berz" and the State of Wisconsin as "the State".

Furthermore, a party cannot waive or be foreclosed from citing or arguing additional historical facts of record that support their argument. Davis has used the undisputed facts of the case and argued that he was unable to intelligently exercise his right to substitution because of a government-created obstacle, highlighting that the circuit court[2] unilaterally and unnecessarily triggered an unrepresented defendant's right to substitute where there was no indication that counsel would or could be appointed within the statutory deadline or the local rule.

The Respondents are, in essence, asking this Court to ignore undisputed facts that prove the circuit court failed its plain duty to apply proper legal standards, to permit Davis, an unrepresented defendant, left without counsel for 60 days after the circuit court, prematurely and unnecessarily, entered a plea on his behalf, to intelligently and timely exercise his right to substitution under the statute or local rule.

Further, even if this Court interprets Davis' argument as a new legal theory, this Court should still decide the substantive and important issue in this appeal in order to avoid having to address the issues in a future appeal should Davis be convicted at a jury

[2] While Judge Berz is the subject of the writ for denying substitution, a Dane County court commissioner entered the plea, not Judge Berz.

trial.[3] *See State v. McKellips*, 2016 WI 51, ¶47, 369 Wis. 2d 437, 881 N.W.2d 258; *see also State v. Harrison*, 2015 WI 5, 360 Wis. 2d 246, 858 N.W.2d 372.

II. This Court should grant the supervisory writ to ensure Mr. Davis can intelligently exercise his right to substitution.

The Respondents argue that the court did not have a plain duty to grant Davis' request. (Respondent Berz's Brief, 16; State's Brief, 5, 9). Respondent Berz then attempts to distinguish the law, proving Davis' point: the circuit court had a duty to assess the request by applying the law to these particular facts, and failed to do so here.

A. There is no difference between relaxing the statutory deadline and the local rule—both are inadequate.

Respondents' argue that Davis has never argued that the deadline for the local rule should also be reasonably construed. (Respondent Berz's Brief, 20; State's Brief, 10). This position ignores the reason behind the local rule: the statutory deadline for filing a substitution request does not allow a defendant

[3] A supervisory writ is the preferred method for denial of substitution claims. However, there are two statutory mechanisms for appealing a denial of substitution. Even if this Court dismisses the case on forfeiture, the same substantive issue can be raised again if Davis is convicted at a trial. *McKellips*, 369 Wis. 2d 437, ¶47.

sufficient time to intelligently exercise the right of substitution. While the local rule attempted to rectify a problem, it did not here. This is because the court triggered a deadline for an unrepresented defendant, and the court did not and could not know when, or if, the defendant would be able to confer with counsel about the right to substitution before the 20-day deadline following arraignment.

Any suggestion that the local rule somehow cures the issue fails to acknowledge how the rule, under these specific facts, allowed Davis the opportunity to intelligently exercise his right to substitution.

B. This Court's jurisprudence has not limited what constitutes a government-created obstacle.

Respondent Berz argues that the court did not violate its plain duty when it denied Davis' substitution request. (Respondent Berz's Brief, 16). Respondent Berz's argument relies on the notion that there are only a specific set of factual scenarios that could ever result in the denial of intelligent exercise of the right to substitution, and that this Court is foreclosed from considering new scenarios that may constitute a government-created obstacle. (State's Brief, 17, 19). This analysis is inconsistent with this Court's jurisprudence.

The question this Court endeavored to answer in previous substitution cases is whether a strict application of §971.20 time limits is reasonable. What is 'reasonable' implicitly requires a court to review the facts and circumstances of each case. While this Court has previously carved out specific factual instances where there is a government-created obstacle that has prevented intelligent exercise of the right to substitution, it has not ruled that those cases provide an exhaustive or exclusive list of factual scenarios where strict application of the statute should be relaxed.

This makes sense, considering there are many scenarios that could affect the right to a fair trial by denying the defendant the right to intelligently exercise substitution. Circuit courts are required to apply legal standards to the facts of each case, and both Respondents failed to demonstrate how the court considered the facts of this case and applied the correct legal standard, except for a blanket assertion that it properly denied the substitution request. (Respondent Berz's Brief, 20). Further, case law supports the position that a court must consider the specific facts of a case to ensure a defendant is able to intelligently exercise the right to substitution.

For example, this Court's decision in *Baldwin v. State,* 62 Wis. 2d 521, 215 N.W.2d 541 (1974), turned on whether a narrow application of §971.20 would defeat its purpose of affording a defendant an opportunity to intelligently exercise the right of substitution. *Id.* at 531-32. This overarching legal

principle has been extended throughout the last three decades of this Court's jurisprudence to different factual scenarios. Such as in *Clark v. State*, 92 Wis. 2d 617, 622-23, 286 N.W.2d 344 (1979), where a motion to the court before arraignment triggered the substitution deadline under §971.20. This Court recognized that under these facts (where the defendant affirmatively filed a motion before arraignment), the substitution was timely under a relaxed application of the statute to give effect to the legislative intent. *Id.* at 628.

In *State ex rel. Tinti v. Cir. Ct. for Waukesha Cnty., Branch 2*, 159 Wis. 2d 783, 464 N.W.2d 853 (Ct. App. 1990), the defendant was unable to intelligently exercise the right to substitution because they were not provided notice of the assigned judge at the time of arraignment. Particularly important there was that the court of appeals went so far as to say that strict application of the statute is only necessary where the initial appearance is held before the judge that is assigned to the case. *Id.* at 790. It did not matter if a defendant knew who the assigned judge was but was still unable to confer with an attorney about whether or not to substitute—because conference with an attorney who has expertise ensures the intelligent exercise of the right to substitute.

In *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cnty.*, 123 Wis. 2d 439, 441, 367 N.W.2d 235, 235 (Ct. App. 1985), the defendant appeared pro se, a plea was entered on his behalf, and then he was given notice of a future court date. Later,

he retained counsel and filed a request for substitution. *Id.* The court of appeals found the request timely, indicating that Racine's procedure for conducting arraignment before the trial judge is assigned resulted in the denial to intelligently exercise the right to substitution. *Id.* at 443.

In *State v. Zimbal*, 2017 WI 59, ¶¶45, 48, 375 Wis. 2d 643, 896 N.W.2d 327, this Court applied the *Baldwin* rationale and ruled that there was a government-created obstacle that prevented intelligent exercise of substitution where the circuit court triggered a deadline by telling the defendant to confer with counsel about whether to file a substitution request.

In *State ex rel. Mace v. Circuit Court for Green Lake County,* 193 Wis. 2d 208, 220, 532 N.W.2d 720, 724 (1995), this Court ruled that the defendant's filing of a motion before the preliminary hearing judge did not waive the right to substitution against the later-assigned trial judge, even where the preliminary hearing judge was the same as the trial judge. The Court denied the state's request to curtail the right of substitution, even in small counties, where a defendant had ever filed a motion in a one-judge county where the defendant knows who the assigned trial judge is. *Id.*

The civil substitution statute has been interpreted in similar fashion—to ensure intelligent exercise of the right to substitute. This Court recognized that, where strict adherence would "defeat

the legislative purpose of allowing substitution of a judge," relaxed time limits are necessary. *State ex rel. Tarney v. McCormack,* 99 Wis. 2d 220, 235, 298 N.W.2d 552, 560 (1980).

Contrary to Respondent Berz's suggestion, Court has never limited what constitutes a government-created obstacle, but instead considers the facts of each case and applies the legal standard to the same.

While the State suggests that specific factual situations are "at odds with the "plain duty" requirement," this fails to acknowledge that the circuit court always has a plain duty to apply the law to the facts of each case, and did not here. (State's Brief, 5).

In any event, even if this Court determines that there are only a certain set of factual scenarios that meet the criteria for a supervisory writ on denial of a substitution request, application of the case law as discussed *supra* to Davis' case results in a government-created obstacle such that he was unable to intelligently exercise his right to substitution. The circuit court failed to comply with its plain duty to apply the law to Davis' factual scenario.

C. The circuit court failed its plain duty to apply the proper legal standards to Mr. Davis' case.

The circuit court has a plain duty to assess, under this Court's jurisprudence, whether denial of a substitution request results in an *unreasonable*

application of §971.20. Both Respondents' briefs fail to address how the circuit court met its duty to scrutinize the facts of this case under the relevant case law.

First, Respondent Berz fails to address if or how the *Baldwin* rationale was considered: how was Davis able to intelligently exercise the right to substitution? Respondent Berz offers no analysis of how denial of Davis' request was reasonable given the court's sua sponte arraignment, before notification of the assigned judge, where the defendant was then without counsel for 60 days. Respondent Berz suggests that because Davis had notice of the judge between the court's unilateral entry of his plea and his supposedly late request for substitution, he could have exercised his right to substitution. (Respondent Berz's Brief, 20). However, Respondent Berz again fails to recognize that Davis was without counsel for 60 days after the court triggered the time limit, without knowing if or when counsel would be appointed, which resulted in an inability to intelligently exercise his right to substitution through conference with appointed counsel about the advantages or disadvantages of substituting on any particular judge.

The Respondents similarly fail to address how the circuit court met its plain duty to consider and apply legal standards to Davis' case, instead suggesting that it was not impossible for Davis to meet the statutory deadline because he could have objected or because intake limited-scope-representation counsel could have filed the request for him. (Respondent Berz's Brief, 23-24; State's Brief, 9-10).

This position fails to recognize the procedures for appointment of counsel and the court's duty to ensure that a defendant has the ability to intelligently exercise the right to substitution, which includes conference with counsel. (*See e.g., Tinti*, 159 Wis. 2d 783, 790-91, holding that resolution does not depend on whether the defendant is represented by counsel—even if a defendant had counsel, the system might not allow for intelligent exercise of the right to substitution.).[4]

Additionally, Respondents fail to acknowledge the similar circumstances and reasoning from the case law. For example, similar to the defendant in *Tessmer,* Davis did not have notice of the assigned judge until after the court entered his plea and gave him a notice of hearing. *Tessmer,* 123 Wis. 2d 439, 443. In both *Tessmer* and here, the defendant was unable to file a timely request due to court procedure, which constitutes a government-created obstacle that left both defendants unable to intelligently exercise substitution. *Id.* at 442-3.

While Respondent Berz attempts to distinguish *Tessmer* by arguing that the court's decision did not turn on the fact that *Tessmer* appeared pro se, (Respondent Berz's Brief, 18), the fact is *Tessmer* did

[4] Both Respondents' suggestion that Davis, an indigent pro se defendant, should have objected or filed his own request is without legal authority. Davis did everything that was required and should not be penalized for failing to assert a pro se objection while awaiting assigned counsel where the court unnecessarily entered a plea.

appear pro se, and the court of appeals determined that he was not aware of the judge before arraignment and therefore could not intelligently exercise the right to substitution. *Id.* at 443. This is also what happened to Davis. While Davis had an additional 20 days by local rule, Davis was still without counsel and therefore unable to conference with counsel about whether to exercise his right to substitution.

Respondent Berz also neglects to address the more egregious circumstances in this case. In *Tessmer*, the defendant retained counsel and filed a substitution request a week after the arraignment. *Id.* at 441. Here, after notification of the assigned judge, which happened at the end of the hearing, Davis was without any counsel for 60 days and therefore could not have intelligently exercised his substitution right through conference with assigned counsel.

It cannot be that Respondent Berz takes the position that there is a distinction between a technically untimely request for a defendant who can retain counsel within 20 days of sua sponte arraignment but not for an indigent defendant who is awaiting appointment of counsel for more than 20 days. Such a distinction would mean that defendants who can afford to hire an attorney before the statutory time period for substitution runs and files a request is afforded the right to substitution whereas an indigent defendant who has no control over when counsel will be appointed does not get the benefit of a relaxed application of the substitution statute.

Respondent Berz and the State also fail to address the applicability of *Zimbal,* 2017 WI 59, instead suggesting that *Zimbal* did not turn on the fact that the defendant was treated as pro se during the relevant time period. (Respondent Berz Brief, 19; State's Brief, 10). However, the positions fail to address the similarities between *Zimbal* and the facts here. Specifically, the judge in *Zimbal* and the circuit court here unnecessarily took action that resulted in a defendant's inability to comply with the statutory deadline or intelligently exercise the right. *Id.,* ¶¶37, 40, 46.

Here, the circuit court failed to address any of the case law that supported Davis' request, instead denying it in two words, violating its plain duty to consider and apply the law.

D. Mr. Davis has shown an extraordinary hardship.

Respondent Berz's suggestion that there is no irreparable harm is perplexing. (Respondent Berz's Brief, 21). This fails to recognize that the substitution statute grants defendants the right to substitute a judge without providing a reason or an affidavit of prejudice. Because there is no duty to assert judicial prejudice, the irreparable harm is implicit in the denial of the request: Davis must now proceed to trial with a judge who denied the substitution request.

III. Equitable tolling should apply.

Respondent Berz also argues that equitable tolling was not raised below, but fails to address that this Court granted the petition for review based on both grounds raised. (Respondent Berz's Brief, 24).

Additionally, contrary to Respondent Berz's suggestion, Davis is not suggesting that Justice Roggensack's concurrence in *Zimbal* is controlling. (Respondent Berz's Brief, 24). Davis argues that equitable tolling is another mechanism that this Court could apply here based on Justice Roggensack's reasoned concurrence in *Zimbal*.

Respondent Berz suggests that Davis is different than *Zimbal* because Davis had notice of the assigned judge at arraignment, and thus no circumstance was out of his control to exercise the right to substitution. (Respondent Berz's Brief, 25-6). However, this position again neglects to recognize the role of limited scope counsel, and suggests that Davis was somehow in control of the court unnecessarily triggering a deadline, or in control of when counsel would be appointed, or whether he would have time under the local rule to confer with counsel about his rights.

Finally, Respondent Berz suggests an apparently unclear record cuts against equitable tolling. (Respondent Berz's Brief, 26). While the record is clear, the court entered a plea at the initial appearance and then gave notice to Davis, any question about the procedural record weighs in favor

of granting equitable tolling, given Davis' later request for substitution was made within 6 days of being appointed counsel. Because he had no control over the court procedure or appointment of counsel, equitable tolling is appropriate.

CONCLUSION

Davis respectfully requests that this Court grant the writ.

Dated this 15th day of September, 2023.

Respectfully submitted,

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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 2,996 words.

Dated this 15th day of September, 2023.

Signed:

Electronically signed by
Kelsey Loshaw
KELSEY LOSHAW
Assistant State Public Defender