

FILED
12-12-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2023AP001534 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIA A. LARSON,

Defendant-Appellant.

APPEAL FROM NONFINAL ORDER DENYING
SUBSTITUTION OF JUDGE IN KENOSHA COUNTY
CIRCUIT COURT WITH THE HONORABLE ANGELINA
GABRIELE PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

MARK D. RICHARDS
State Bar No. 1006324

RICHARDS & ASSOCIATES, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200 (P)
262-632-3888 (F)
mdr@richardslawracine.com

STATEMENT OF ISSUES

Whether a request for substitution of judge pursuant to Wis. Stat. §971.20(4) is timely when submitted before the preliminary hearing.

The circuit court answered no.

STATEMENT OF THE CASE

On March 21, 2022, Sandy Langel was found dead in her bedroom of an opiate overdose. Upon investigation by the Kenosha Sheriff's Department it was determined that Ms. Langel had made contact by text message with Gerald Campion regarding the purchase of pain medication in exchange for money. (R.2, A-App 5).

A criminal complaint was filed on February 3, 2023, charging codefendants Maria Larson and Gerald Campion with First Degree Reckless Homicide, as Party to a Crime. (R.2,A-App 5). An initial appearance was held for Maria Larson on February 8, 2023. (R.56, A-App 3) At the scheduled preliminary hearing on February 16, 2023 Maria Larson's original defense attorney withdrew from the case, and the time limit for preliminary hearing was waived. (R.56, A-App 3) On February 19, 2023 codefendant Gerald Campion passed away unexpectedly. On February 22, 2023 the case against Mr. Campion (2023CF190) was dismissed. (A-App 9,10).

Upon retaining new defense counsel, a preliminary hearing for Ms. Larson was scheduled for July 12, 2023 at 8:30am. (R.56, A-App 3). A new Information was filed on July 12, 2023 alleging the same count, but without the codefendant Campion listed. (R.27, A-App 11). There were no other codefendants listed at any time, leaving Ms. Larson as the sole defendant. On July 12, 2023 at 6:54am, Larson's counsel e-filed a request for substitution of Honorable Judge Angelina Gabriele pursuant to Wis. Stat. §971.20(4). (R.25, A-App 12). Judge Gabriele was known in advance to be the assigned judge by reviewing the criminal complaint filed February 3, 2023 and reading the file stamp in the top right corner of the document.

(R.2, A-App 5).

Larson waived the preliminary hearing on July 12, 2023, and arraignment commenced immediately thereafter at the same court appearance, as is standard practice in Kenosha County. (R.56, A-App 2).

The request for substitution of judge was denied by Judge Gabriele on July 17, 2023, with the explanation noting that this was a “co-defendant case”, which pursuant to Wis. Stat. §971.20(6) would require the request to be made jointly by all defendants. (R.30, A-App 13, 14). However, as indicated above, the codefendant in this matter passed away and his case was dismissed, leaving no other defendant than Ms. Larson. No codefendant was listed on the Information filed July 12, 2023. (R.27, A-App 11)

Larson’s attorney then wrote a letter to Circuit Chief Judge Jason Rossell requesting review of the denial of request for substitution of judge, which was e-filed on July 17, 2023. (R.31, A-App 15-24). Under Wisconsin Supreme Court Rule 70.21(26) and *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, the Chief Judge may review orders denying substitution.

On August 10, 2023, Chief Judge Rossell filed a Findings and Order denying the request for substitution of judge. (R.40, A-App 1, 2). In his order, the Chief Judge found that Wis. Stat. §971.20(6) was satisfied because there was no longer a codefendant in the matter. However, the circuit court denied the request on different grounds, that the request was made too early. Wis. Stat. §971.20(4) requires a request for substitution be made before making any motions to the trial court and before arraignment. It was not disputed that there were no motions made to the trial court, or that the request was made before arraignment. However, the request was denied on grounds that, under *Mace v. Green Lake County Circuit Court*, 193 Wis. 2d 208, 217-18 (1995), the judge that Larson requested substitution on was not the officially assigned trial judge until bindover after the preliminary hearing. The circuit court further stated in the Findings and Order that because the substitution request was filed at 6:54am July 12, 2023, *prior to the bindover and assignment of the case to Judge Gabriele*,

(emphasis added)which occurred sometime after 8:30am that day, the request was deemed untimely for being too early and was therefore denied (emphasis added). (R.40, A-App 1, 2).

That ruling is the subject of this interlocutory appeal.

ARGUMENT

I. A PLAIN READING OF THE 971.20(4) STATUTE ALLOWS FOR SUBSTITUTION OF JUDGE REQUESTS TO BE FILED BEFORE PRELIMINARY HEARING AND BINDOVER.

Wis. Stat. §971.20 governs a criminal defendant's right to substitute a trial judge, and the appeals court reviews the trial court's decision *de novo*. *State v. Duyer*, 181 Wis. 2d 826, 836, 512 N.W.2d 233 (Ct. App. 1994). ("construction of a statute presents a question of law, subject to *de novo* review on appeal"). Inquiry on the matter "begins with the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane Cnty*, 2004 WI 58, ¶ 45, 271 W.s2d 633, 681 N.W.2d 110. The appeals court gives statutory language "its common, ordinary, and accepted meaning." *Id.* The court must interpret statutory language "reasonably, to avoid absurd or unreasonable results." *Id.*

Wis. Stat §971.20(4) reads as follows:

(4) SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

Applying §971.20(4) to the facts before us, there is no doubt that Judge Gabriele was the judge "originally assigned" to the case. Judge Gabriele was originally assigned to Larson's case the same day the original criminal complaint was filed –

February 3, 2023. This is evidenced by the electronic file stamp noting the case number, circuit court branch, and judge assigned in the top right corner of the original criminal complaint. (R.2, A-App 5-8). Moreover, the Information filed on July 12, 2023 also included Judge Gabriele's name, this time in the case caption. (R.27, A-App 11).

There is no language in §971.20(4) that requires a filing after a preliminary hearing, but before arraignment. Therefore, pursuant to §971.20(4), Larson should have filed a request for substitution of judge before the preliminary hearing scheduled for July 12, 2023. *State v. Bohannon*, 349 Wis.2d 368, ¶ 20, 835 N.W.2d 262 (Ct. App. 2013). In this matter, Larson did in fact file the request before the preliminary hearing. (R.40; R. 25; A-App 1, 2; and A-App 12)

II. REQUIRING DEFENDANTS TO FILE A REQUEST FOR SUBSTITUTION OF JUDGE AFTER PRELIMINARY HEARING, BUT BEFORE ARRAIGNMENT, WOULD RESULT IN AN INEFFICIENT ADMINISTRATION OF JUSTICE.

The circuit court order requires that a defendant file a request for substitution of judge after the preliminary hearing and bindover when the judge officially “becomes the trial judge”. (R.40, A-App 1, 2). In a Kenosha County Circuit Court felony case, preliminary hearing and arraignment are scheduled for the same court appearance.

Upholding the Circuit Court's order would result in an inefficient process where the defendant would have to pause the court appearance after the preliminary hearing in order to file a request for substitution of judge before the arraignment. Court commissioners or preliminary hearing judges would see their schedules delayed by attorneys on their computers frantically attempting to e-file requests for substitution, or bringing in paper copies of requests to be filed at the hearing. The expected delays would include poor internet connectivity and potential filing mistakes, resulting in additional litigation to clear up the record. Alternatively, courts would be required to schedule preliminary hearings and arraignments on different

court dates to allow for a request to be filed, resulting in an additional burden to the court calendar. This burden is made more manageable by allowing defendants to file requests for substitution in advance of the preliminary hearing as the statute plainly allows.

III. MACE v. GREEN LAKE COUNTY CIRCUIT COURT IS READILY DISTINGUISHABLE FROM THE PRESENT FACT PATTERN.

i. Discussion of Mace v. Green Lake County Circuit Court

The circuit court's order relies on a reading of the foundational case regarding § 971.20(4), Mace v. Green Lake County Circuit Court, 193 Wis. 2d 208, 217-18 (1995). The question before the court in *Mace* was whether a motion to reduce bond, after an initial appearance, but before the preliminary hearing, constituted a motion before the trial court that would disqualify an attempted request for substitution of judge. *See Mace*. This question was relevant in a county with a single judge who handled both the preliminary matters and the trial court matters in the county. *Id.* There was a question of whether, because Green Lake was a single judge county, that the defendant knew who the trial judge would be in advance, and therefore should have acted sooner on their request. The motion to reduce bail made to this judge in advance of arraignment was argued by the state to constitute a motion made to the trial judge because they would be the same person. The Supreme Court in *Mace* held that a judge does not officially become the trial judge until bindover after the preliminary hearing, meaning that any motion to reduce bond before bindover was not before the trial court and therefore a request for substitution was allowed. *Id.*

The preliminary court matters in *Mace* were drawn out over the course of 14 months. The initial appearance happened on November 30, 1992, the preliminary hearing happened on January 5, 1994, and the arraignment happened on January 24, 1994. *Id.* at 212-13. Before the arraignment the parties were issued written notice of who the trial judge assigned would be,

but there was no mystery as it was a single judge county. *Id at* 213. On January 20, 1994, in advance of the January 24, 1994 arraignment, Mace filed a motion for substitution of the trial judge, which was denied by the circuit court, but ultimately granted by the Supreme Court. *Id.*

ii. Application to Present Case

In the present case, there are no issues of motions made in advance of arraignment, aside from a motion to withdraw from her prior counsel made before the originally scheduled February 16, 2023 preliminary hearing before the court commissioner. (R.56, A-App 3). There are no remaining issues of co-defendants requiring adherence to §971.20(6). The only issue is whether a request for substitution made before the preliminary hearing is valid under *Mace* and §971.20(4).

There was no calendar delay between preliminary hearing and arraignment for Larson, they were scheduled for the same court appearance. (R.56, A-App 3). There was no written notice to Larson of trial judge assignment after preliminary hearing as there was in *Mace*. In modern practice for the Kenosha Circuit Court, requests for substitution are e-filed in advance of the preliminary hearing, and then noted as such at the hearing to be clear for the court commissioner's record, which was done in this case. (R.33 at 4 lines 10-12, A-App 28 at line 10-12) Also, as noted above, the assigned judge is known in advance of the preliminary hearing by the file stamp on the criminal complaint (R.2, A-App 5), as well as by searching on CCAP online (A-App 32). One effect of knowing who the assigned judge is in advance is to expedite the preliminary hearing and arraignment process by allowing the defendant to make an informed decision about whether they want to request substitution of that judge.

iii. Concurring Opinion Support

The focus on the issue of bindover in the *Mace* decision was to mark the boundary where motions before a given judge are either before the trial court or before the preliminary court. Nothing in *Mace* indicated that filing a request for substitution in advance of the preliminary hearing would disqualify that

request for being untimely. To the contrary, the concurring opinion by Justice Wilcox and joined by Justices Day and Steinmetz felt that waiting until the last minute before arraignment would result in using the statute for purposes of delay, expressly forbidden by the legislature in regards to this statute. *Id* at 222. The concurrence further stated that a defendant should not delay in filing the request once the defendant ascertains or should have ascertained the identity of the trial judge. *Id* at 223. Upholding the Circuit Court order in this instance would undoubtedly result in future strategic delay by enterprising defense attorneys, as was warned by the concurring justices.

CONCLUSION

For the reasons stated above, Ms. Larson asks the court of appeals to overturn the trial court's order denying her request for substitution of judge, and remand this matter for further proceedings consistent therewith.

Dated this 13th day of December, 2023.

Respectfully submitted,

Electronically Signed by:
MARK D. RICHARDS
State Bar No. 1006324
Richards & Associates, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200 (P)
262-632-3888 (F)
mdr@richardslawracine.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,087 words.

Dated this 13th day of December, 2023.

Electronically Signed by:

MARK D. RICHARDS

State Bar No. 1006324

Richards & Associates, S.C.

209 Eighth Street

Racine, WI 53403

262-632-2200 (P)

262-632-3888 (F)

mdr@richardslawracine.com

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 on or after 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 13th day of December, 2023.

Electronically Signed by:

MARK D. RICHARDS
State Bar No. 1006324
Richards & Associates, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200 (P)
262-632-3888 (F)
mdr@richardslawracine.com