

FILED
12-29-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Case No. 2023AP1534-CRAC

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARIA A. LARSON,
Defendant-Appellant.

ON APPEAL FROM A NONFINAL ORDER DENYING A
REQUEST FOR JUDICIAL SUBSTITUTION, ENTERED
IN THE CIRCUIT COURT FOR KENOSHA COUNTY,
THE HONORABLE ANGELINA GABRIELE AND THE
HONORABLE JASON A. ROSSELL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

By statute, a criminal defendant is entitled to a single substitution of “the judge originally assigned” to her trial if she files her request prior to arraignment and before any motions. Supreme court precedent teaches, however, that a judge is not assigned to a defendant’s trial until she is bound over for trial and that a premature substitution request is of no legal effect. Was Defendant-Appellant Maria A. Larson entitled to the substitution of her assigned trial judge despite filing her request *before* being bound over for trial and *before* that judge was even assigned?

The judge currently assigned to Larson’s trial answered no, albeit for another reason.

The chief judge of the corresponding judicial district answered no, concluding that Larson’s request was untimely.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary as the arguments are fully developed in the parties’ briefs. Publication is warranted under Wis. Stat. § (Rule) 809.23(1)(a)1. to reaffirm that a premature judicial substitution request, filed before a judge has been assigned to a defendant’s trial, is of no legal effect.

STATEMENT OF THE CASE

The State charged Larson with one count of first-degree reckless homicide as party to the crime, alleging that she illegally delivered a narcotic drug to Jerry Campion, who then sold it to a woman who suffered a fatal overdose. (R. 2.)

Following several continuances to allow her to secure representation, Larson appeared before a court commissioner, with defense counsel, and waived her right to a preliminary hearing. (R. 33:2–3.) The commissioner accepted her waiver,

bound her over for trial, and advised the parties that the case would be assigned to Judge Angelina Gabriele. (R. 33:3–4.)

The commissioner proceeded to Larson’s arraignment, acknowledging receipt of the Information and asking Larson’s attorney if he had received a copy. (R. 33:4.) In response, defense counsel explained that he had “filed electronically” a judicial substitution request earlier that morning. (R. 33:4.) The commissioner acknowledged receipt of the substitution request and informed the parties that Larson’s case would then be assigned to Judge Anthony Milisauskas. (R. 33:5.)

After Larson’s arraignment, Judge Gabriele issued an order denying her substitution request on the grounds that there was a co-defendant in Larson’s case.¹ (R. 30:2.) Larson then requested that Judge Gabriele reconsider her decision in a letter filed two weeks later, informing the court that her sole co-defendant, Gerald Campion, had died earlier that year, resulting in his case’s dismissal. (R. 31:1.)

Because Campion had passed away, Larson argued that her substitution request should be granted under Wis. Stat. § 971.20(4), which required only that she file a written request before any other motions and prior to arraignment. (R. 31:1.) Since she filed her request before arraignment and prior to any other motions, Larson insisted her request was timely and should be granted. (R. 31:1–2.) Judge Gabriele took no further action on Larson’s reconsideration request.

Days later, the Honorable Jason A. Rossell, Chief Judge of the Second Judicial District and fellow member of the Kenosha County Circuit Court, issued an order revealing that Larson had sought review of Judge Gabriele’s denial of her

¹ Pursuant to Wis. Stat. § 971.20(6), all joined co-defendants must collectively request for judicial substitution for any particular co-defendant’s substitution request to be honored. *State ex rel. Garibay v. Circuit Court for Kenosha County*, 2002 WI App 164, ¶ 10, 256 Wis. 2d 438, 647 N.W.2d 455.

substitution request, as authorized by Supreme Court Rule 70.21(26) and *State ex rel. Findorff v. Circuit Court for Milwaukee County*, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679. (R. 40:1.)

Judge Rossell noted Judge Gabriele's basis for denying Larson's request, observed that joined co-defendants must make a joint substitution request unless their cases were severed, and confirmed that dismissal of Campion's case resulted in case severance. (R. 40:1–2.)

Nevertheless, he denied Larson's substitution request as “not filed appropriately or timely.” (R. 40:2.) Supporting that conclusion, Judge Rossell explained that Wis. Stat. § 971.20(4) requires a defendant seeking “substitution of the judge originally assigned to the trial” to file a written request with the “clerk before making any motions to the trial court and before arraignment.” (R. 40:2.) Citing supreme court precedent providing that a judge does not become the “trial judge” until a defendant is bound over for trial, and observing that Larson filed her substitution request hours before she was bound over for trial at her preliminary hearing, Judge Rossell concluded that Larson's substitution request was filed untimely. (R. 40:2.)

Larson subsequently filed a petition for leave to appeal that nonfinal order, which this Court granted.

STANDARD OF REVIEW

Larson challenges Judge Rossell's determination that she was required under Wis. Stat. § 971.20(4) to file her judicial substitution request after she was bound over for trial. This presents a question of statutory interpretation, which this Court reviews *de novo*. *State v. Gramza*, 2020 WI App 81, ¶ 15, 395 Wis. 2d 215, 952 N.W.2d 836.

ARGUMENT

Judge Rossell correctly denied Larson’s untimely judicial substitution request.

Larson insists that her judicial substitution request was timely because, under her interpretation of the governing statute, a defendant need only file her request any time before her preliminary hearing, which she did. (Larson’s Br. 5.) She is wrong. When Larson filed her substitution request, there was no judge assigned to her trial to substitute. Her request was premature and of no legal effect, and Judge Rossell was correct to deny it.

A. A criminal defendant is entitled to a single substitution of the judge originally assigned to her case after she is bound over for trial.

“Wisconsin Stat. § 971.20 grants criminal defendants the right to substitute a judge without providing a reason for the requested substitution.” *State v. Harrison*, 2015 WI 5, ¶ 39, 360 Wis. 2d 246, 858 N.W.2d 372. That same statute prescribes the manner and time by which a defendant must exercise that right. Wis. Stat. § 971.20(3)–(7).

As a starting point, barring an appellate court ordering a new trial or sentencing hearing, a “defendant has a right to only one substitution of a judge.” Wis. Stat. § 971.20(2). How a defendant exercises that request depends on the stage of her proceedings, Wis. Stat. § 971.20(3)–(4), whether a new judge has subsequently been assigned to the defendant’s trial during the pendency of the case, Wis. Stat. § 971.20(5), and whether the defendant has been charged jointly with other co-defendants, Wis. Stat. § 971.20(6).

For instance, when first charged in this case, the State alleged that Larson and Campion were co-defendants as they were parties to the same crime. (R. 2:1.) In that situation, *one* co-defendant cannot exercise the right to judicial substitution

unless *all* joined co-defendants join the request. *Garibay*, 256 Wis. 2d 438, ¶ 10; Wis. Stat. § 971.20(6).

When not a joined co-defendant—as was the situation after Larson’s case was severed from Campion’s case—one may also exercise her right to judicial substitution at several pretrial stages. Wis. Stat. § 971.20(3)–(5). A defendant seeking to have a different judge or court commissioner preside over her preliminary hearing may file a substitution request at her initial appearance or no later than five days before her preliminary hearing, unless the court approves otherwise. Wis. Stat. § 971.20(3)(b). Or if a defendant elects not to seek substitution at that early stage, “[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.” Wis. Stat. § 971.20(4) (emphasis added).

Particularly relevant to that latter request, a circuit court judge is not assigned to preside over a defendant’s trial until that defendant is bound over for trial, which occurs when “probable cause has been found at the preliminary examination” or when “the defendant waives the preliminary examination.” *Mace v. Green Lake County Circuit Court*, 193 Wis. 2d 208, 217–18, 532 N.W.2d 720 (1995). And on at least one occasion, our supreme court has ruled that a substitution request was of no legal effect if filed prematurely. *Rohl v. State*, 97 Wis. 2d 514, 516, 292 N.W.2d 922 (1980).

B. Larson’s premature substitution request was untimely because it sought substitution of a judge not yet assigned to her trial.

When Larson filed her judicial substitution request, Judge Gabriele was not yet assigned to preside over her trial because Larson had not yet been bound over for trial, which did not occur until later that day when she waived her right to a preliminary hearing. *See Mace*, 193 Wis. 2d at 217–18.

Her judicial substitution request was therefore premature and of no legal effect, and Judge Rossell was correct to reject it on that basis. *Rohl*, 97 Wis. 2d at 516.

Nevertheless, Larson insists her judicial substitution request was timely since (1) Wis. Stat. § 971.20 permits a defendant to substitute the trial judge originally assigned to her action as long as she files a request with the clerk before any other motions and before arraignment, (2) Judge Gabriele was originally assigned to her trial on the day the State filed its original criminal complaint, and (3) Wis. Stat. § 971.20(4) imposes no duty upon a defendant to file her judicial substitution request after her preliminary hearing but before arraignment. (Larson’s Br. 3–4.)

She is wrong on two of her three points. Admittedly, she is correct that Wis. Stat. § 971.20(4) authorizes a criminal defendant to seek substitution of the judge originally assigned to her trial; the statute provides exactly that. She is incorrect, however, that Judge Gabriele was assigned to her trial at any time before she was ultimately bound over for trial and that Wis. Stat. § 971.20(4) imposes no duty to wait until after a defendant is bound over for trial to seek substitution of the judge originally assigned to that trial.

Turning to Larson’s first error, *Mace* teaches that the same circuit court judge may wear different hats at different times in the same case. *Mace*, 193 Wis. 2d at 215–18. As the supreme court explained, “For purposes of sec. 971.20, a criminal action consists of two separate and distinct phases, with the bindover at a preliminary examination marking the end of one phase and the beginning of the other.” *Id.* at 217. Given that demarcation, it is clear that whether any judge that is the assigned trial court judge for purposes of Wis. Stat. § 971.20(4) turns *not* on the judge’s *identity* but on *timing*, as there “is no trial court until after a bindover.” *Id.* at 218.

Although Larson recognizes *Mace*'s holding—"that a judge does not officially become the trial judge until bindover after the preliminary hearing"—she tries to escape it by distinguishing *Mace* on its underlying facts and procedural history. (Larson's Br. 5–6.) Her efforts prove futile because, contrary to her assessment, the supreme court in no way limited its holding to cases originating in a "single-judge county," to those with prominent delay between initial appearance and arraignment, or to those where a defendant receives written notice of the judge assigned to her case. *See Mace*, 193 Wis. 2d at 215–22.

Moreover, any significance Larson affords to the file stamp on the corner of her criminal complaint is misplaced. (Larson's Br. 3–4.) Even if she presided over any proceedings preceding Larson's preliminary hearing, what matters is *when* Judge Gabriele was originally assigned to Larson's *trial*. *Mace*, 193 Wis. 2d at 218. This occurred when Larson was bound over for trial, hours *after* she filed her judicial substitution request. (R. 40:2.) The file stamp on Larson's Information does not change that; when the State filed that document, Larson was bound over for trial, so Judge Gabriele had already become the judge originally assigned to Larson's trial. *See Mace*, 193 Wis. 2d at 217–18. In short, nothing about the file stamps on Larson's criminal complaint or Information establishes that Judge Gabriele was assigned to Larson's trial when she filed her substitution request.

Larson's statutory argument fares no better. She points out that the text of Wis. Stat. § 971.20(4) does not explicitly require a defendant to file her judicial substitution request after her preliminary hearing but before her arraignment. (Larson's Br. 4.) Given that subsection's silence surrounding a defendant's preliminary hearing, she infers that one may file her substitution request any time before arraignment, even before her preliminary hearing. (Larson's Br. 4.)

Larson fails to read the referenced statutory subsection in context in which it is used. As our supreme court has made clear, when interpreting a statute, it is important to consider not just the language of the statute in isolation but “in the context in which it is used . . . in relation to the language of surrounding or close-related statutes.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Here, the text of Wis. Stat. § 971.20(4) and surrounding statutes only support Judge Rossell’s conclusion that Larson’s substitution request was untimely. For starters, Wis. Stat. § 971.20(4) clarifies that any request under that subsection relates to “the judge originally assigned to the trial of the action.” Because a judge is not assigned to the trial of any felony criminal matter until a defendant is bound over for trial, *Mace*, 193 Wis. 2d at 218, Wis. Stat. § 971.20(4) has no application to requests made before a preliminary hearing has occurred as there is no assigned judge to substitute. On the other hand, Wis. Stat. § 971.20(3)(b) anticipates that a defendant may seek substitution before her preliminary hearing to have another judge or court commissioner preside over that hearing, but any such request must be made at least five days before the preliminary hearing unless the court otherwise permits. Wis. Stat. § 971.20(3)(b).

Read in concert, Wis. Stat. §§ 971.20(3)(b) and 971.20(4) make it clear that the *timing* of a judicial substitution request matters. Although Larson could have exercised her right to request a different court commissioner or judge to preside over her preliminary hearing, she did not do so; her request did not cite Wis. Stat. § 971.20(3)(b), nor did she ask that a different commissioner preside over her preliminary hearing waiver when she appeared in court. (R. 25; 33:2.) Even if she had, her request would have been untimely as she filed it hours before her hearing commenced. (R. 40:1.) And, again, when she ultimately requested to have a different judge

assigned to her trial, she made her request when there was no judge assigned.

In the end, Larson did not request that a different judge or commissioner preside over the preliminary hearing that she waived, and she prematurely filed a request to substitute Judge Gabriele before Judge Gabriele was even assigned to her trial. Larson's substitution request was premature and of no legal effect, and Judge Rossell was correct to deny it. *Rohl*, 97 Wis. 2d at 516.

C. Larson's policy arguments do not save her untimely substitution request.

Inviting this Court to overlook the untimeliness of her judicial substitution request, Larson offers various policy arguments to justify her alternative reading of the relevant statutes. (Larson's Br. 4–5.) To that end, she complains that requiring a defendant to file her substitution request after she is bound over for trial will lead to procedural inefficiencies, requiring judges to either pause hearings while attorneys combat “poor internet connectivity” to “frantically attempt[] to e-file requests for substitution[]” or schedule arraignments for a different day, causing “additional burden to the court calendar.” (Larson's Br. 4–5.)

Larson's overstated policy considerations do not allow this Court to disregard statutory language or supreme court precedent. As the State has explained, Larson's substitution request was premature and of no legal effect, and her various legal arguments do not change that. That the current law may provoke some inefficiencies in the criminal justice system does not allow litigants to ignore what the law demands. In the end, Larson's substitution request was untimely, and nothing in her appellate brief refutes that point.

Finally, Justice Wilcox's concurring opinion in *Mace* only hurts, rather than helps, Larson's argument. Indeed, he openly conceded that, despite the policy considerations that

he and other justices shared about the negative ramifications of the majority's decision, he was bound by the law as written. *Mace*, 193 Wis. 2d at 222 (Wilcox, J., concurring). So, too, is this Court, and it must honor the statutory authority and supreme court precedent that confirms Larson's substitution request was untimely and of no legal effect.

CONCLUSION

This Court should affirm the nonfinal order denying Laron's judicial substitution request.

Dated this 29th day of December 2023.

Respectfully submitted,

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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 2,614 words.

Dated this 29th day of December 2023.

Electronically signed by:

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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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of December 2023.

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