Court of Appeals Copy

WISCONSIN
COURT OF APPEALS
DISTRICT III

State of Wisconsin, Plaintiff-Respondent,

V

Appeal No: 2020 AP 1636 CR
Price County Case No: 18CM120

Richard Hoeft, Defendant-Appellant.

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ON APPEAL FROM A DENIAL OF A POSTCONVICTION MOTION ENTERED IN PRICE COUNTY CIRCUIT COURT, ON AUGUST 24TH, 2021, HONORABLE KEVIN KLEIN, PRESIDING

Submitted by: Richard Hoeft
PO Box 462
Park Falls, Wis. 54552

TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT & PUBLICATION

Neither are Requested

CASES CITED

CONSTITUTIONAL AMENDMENTS

BACKGROUND

In December of 2018, Defendant-Appellant was charged with 1 count of Defrauding an Inn Keeper, in Violation of Chapter 943, of the Wisconsin Penal Code. (*See CCAP, Wisconsin v Richard Hoeft, Price County Case no. 18CM120).* Numerous hearings were held, and the trial was eventually held on October 10th 2019.

At the outset of the case, Defendant-Appellant chose to represent himself. The necessary colloquoy was conducted, and is not part of the appeal. Several hearings were held between then and the final pretrial, Which was held on September 19, 2019. (*21 days before the trial).*

One of those hearings was held on May 15th , 2019. At that hearing, the Circiut Court told the Defendant-Appellant that it would go through the attorney waiver colloquoy at any proceedings, but it Cautioned the Defendant-Appellant that if he waited until a week before the trial and then asked for an attorney, the Circuit Court wouldn't entertain the motion. (*May 15th hearing, at page 9).*

A final pretrial hearing was held on September 19th, 2019. At the outset of the final pretrial, Defendant-Appellant notified the Circuit Court that he wished to abandon his pro se satus, and wished to hire an attorney. (*September 19th, 2019 Final Pretrial, at page 3).* The Circuit Court scolded Defendant-Appellant and stated that he wasn't going to continue the trial, so Defendant-Appellant could hire an attorney, or get an attorney through the public defenders office. (*Id. At 3-4).*

A jury trial commenced on October 9, 2019. The jury returned a guilty verdict. Sentencing was postponed a few times so I could get an attorney. At sentencing, the Circuit Court sentenced the Defendant-Appellant to 30 days in jail. On March 4th 2020, the sentence was stayed pending appeal. Defendant-Appellant filed a postconviction motion, which was denied on August 24th, 2021. Defendant-Appellant filed a notice of appeal. That brings us to this appeal.

LEGAL AUTHORITY

The Court of appeals usually states that a litigant has to cite at least 1 legal authority, for the Court to rule on their appeal. This whole appeal is governed under the 6th and 14th amendments to the US Constitution. That should satisfy that rule.

LEGAL ARGUMENT

1. Should the US Constitution's 6th Amendment Right to counsel, be treated as a tantamount to, or at least similarily situated to the US Constitution's 5th Amendment Right to Counsel in a police interrogation.

Every American Citizen is Blessed With a Federal Constitution, and a State Constitution, that protects them from government overreaching. We can All thank the founders of this Country for that.

With that said, Defendant-Appellant will hone in on specific language that the 5th Amendment, as well

as the 6th Amendment states, and this Court can take Judicial Notice that these Amendments, and others are applicable to the States via the 14th Amendment, which was ratified during the reconstruction phase in the early 1870s, after the worst part of our history. The Civil War.

It would be obnoxious to think that the right to counsel clauses of the 5th, and 6th Amendments were one in the same. But they actually are.

In a police interrogation, if the accused asserts his right to an attorney, there is a process for that. He/she cannot say "well, mr police officer, do you think I need an attorney". Or words or phases as such. They must unequivically assert that they want an attorney, and they don't want to talk to the police any further. *State v Long, 190 Wis 2d 386 (Wis App. 1994).*

In a criminal proceeding, it is called standing mute. In a criminal proceeding, if the defendant wants an attorney, he or she simply tells the judge that they want an attorney to represent them, and the court, has to either adjourn the proceedings until an attorney can be appointed, or hired. (*As long as they don't wait until the 11th hour before the trial. State v Pickens, 96 Wis. 2D 549 (1980)).* Or the Circuit Court runs the risk of the Defendant-Appellant appealling the case. Such as this.

In the case at hand, Judge Klein, was given 3 weeks notice before the trial, that Defendant-Appellant wanted to abandon his pro se status, and wished to have an attorney represent him. (*September 9th 2019 final pretrial, at page 3).* Defendant-Appellant gave reasons for his departure from his pro se status. There weren't any jury secured, or witnesses subpoenaed. Even if they were, 3 weeks is more than enough time to contact witnesses to let them know that the trial is off.

Further, what if Defendant-Appellant filed an interlocutory appeal immediately after the final pretrial, and this court accepted the issue. The trial would have been taken off the calendar then. Also, in *State v Hoeft, case no. 18 CF 90,* Judge Klein took that case off the calendar. Defendant-Appelland doesn't understand how the Circuit Court can adjourn one case at the final pretrial, and not the other. For the same reason.

2. If the Court Rules Against Defendant-Appellant on Issue Number one, Then When is it too Late for a Pro Se person, to ask for an Attorney, Prior to Trial.

In this case, Defendant-Appellant told the Circuit Court that he wanted an attorney at the final pretrial hearing, which was 21 days before the trial. Defendant-Appellant argues that 21 days is sufficient to grant a continuance in order to secure counsel.

The 21 day period that is very important, because at the May 15th, 2019 hearing, on page 9, the Circuit Court said the following:

> "All right. So with that idea and, of course, We'll cover your waiver of the right to be represented at any point that we have proceedings that you are going to participate in, we will go over that again".
>
> "But the record in both these cases is going to reflect that you have made a decision not to be represented. And what that means, similar to the

> discussions about health or whatever else, is that if we get to a time a week before trial and you say I (Defendant-Appellant) don't have an attorney, I don't have time to get an attorney, the court is simply not going to entertain that".

In the first paragraph, the Circuit Court told Defendant-Appellant that at any part of the proceedings, the Circuit Court would go over the waiver of right to counsel. And if Defendant-Appellant wanted an attorney, the Circuit Court would entertain the motion, and Defendant-Appellant could get an attorney. There isn't any other meaning that the Plaintiff-Respondent can come up with in their brief.

In the second paragraph, the Circuit Court states that Defendant-Appellant shouldn't wait until a week before the trial, and then tell the Circuit Court that Defendant-Appellant needs an attorney.

Defendant-Appellant took the words of the Circuit Court literally. Defendant-Appellant told the Circuit Court that he wanted an attorney, and the time frame was way over 1 week before the trial. Defendant-Appellant did everything the Circuit Court stated, and the Circuit Court violated Defendant-Appellant of his Constitutional right to counsel.

If judges could say 5 months before a trial that they will not allow a pro se person to get an attorney, then what if a person appears at the initial appearance, preliminary hearing, and arraignment, pro se. then at the arraignment demands a speedy trial. (*Defendant in a felony case must wait until after arraignment to assert speedy trial*) and the District Attorney complies, and gives the defendant their trial within 90 days. The defendant would not be able to get an attorney, regardless if witnesses were subpoenaed or not.

In the present case, there were no witnesses subpoenaed, or anything on September 19th , 2019. However, after the trial, the sentencing was postponed several times. (*December 16th 2019, February 19th 2020,)*. Further, at a hearing on Defendant-Appellant's stay the sentence until after the appeal process, the Circuit Court stated

> "Mr Hoeft, I don't think you are delaying, if you would have come to the sentencing hearing and stated that you wanted a continuance so you could get an attorney, I would have been obligated to continue the case so you could get one." (*March 4th 2020 hearing, at page 14)*. The trial is just as critical of a stage of the proceedings as the sentencing.

Further, if the Circuit Court were correct in its ruling at the final pretrial, then why did the Circuit Court continue the companion case *(18 CF 90)* at the final pretrial in that case, so Defendant-Appellant could get a different attorney. *(APP 1)*. The Circuit Court abused its discretion when it failed to grant a continuance in the case at hand.

The 6th Amendment of the US Constitution, guarantees every defendant the right to the assisstance of counsel.

> ***5. The State Violated Defendant-Appellant's Due Process Rights, when 20 Minutes Before the Start of the Jury Trial, Plaintiff-Respondent Tried to get Defendant-Appellant found in Contempt, Making it so***

Defendant-Appellant Couldn't Represent Himself to the Best of His Abilities.

On the morning of the jury trial, and about 20 minutes before the start of the trial, Plaintiff-Respondent attempted to get Defendant-Appellant held in contempt, for failing to get some medical documents to the court. *(October 9th, 2019 Jury Trial, at pages 7-9).* The Circuit Court held that it wasnt going to rule on a contempt motion 20 minutes before the start of the trial. *(Id at 9).* But would entertain the motion in the future. *(Id. At 9).* In *State v Lettice, 205 Wis 2d 347 (Wis. App 1996),* this court ruled that Vilas County prosecutor Steven Lucarelli violated Lettice's rights when Lucarelli filed contempt charges a couple day before the trial.

This case is far more eggregious than the *Lettice* case because defendant-Appellant was serving as his own attorney. Not by choice. Defendant-Appellant had to bear the burden and stress of the trial, if he won, was the Plaintiff-Appellant going to re-motion for the contempt, if Defendant-Appellant lost the trial, would Plaintiff-Respondent disredard the contempt charge. Defendant-Appellant argues that his due process rights were violated by the states actions.

3. When Analyzing Wisconsin Statute 971.23, What is to be Considered "a reasonable time." And Further, is the evening before trial, "a reasonable time. And Did the Circuit Court Violate The Defendant-Appellant's Rights When it Denied His Motion for a Continuance.

Hoeft received the discovery documents in the mail on the afternoon before the trial, at about 430pm. *(Jury Trial, at 11-18).* That is undisputed. The only half hearted dispute that Plaintiff-Respondent comes up with is "well, we put it in the mail on the 3rd". *(Id. At 15-16).* Defendant-Appellant argues that the afternoon before the trial, is not reasonable to look at the documents, and build a defense. Plaintiff-Respondent knew that, and therefore, did it on purpose. Further, the Circuit Court sided with the Plaintiff-Appellant, with no evidence to back it up.

What if Defendant-Appellant had an attorney, and the attorney received the discovery the afternoon before the trial. The attorney, would file a motion for a continuance, just like Defendant-Appellant did. The Circuit Court would have been obligated to grant the continuance, otherwise, the attorney would not have been able to represent defendant-Appellant effectively. So why didn't the Circuit Court grant Defendant-Appellant's motion for a continuance.

And more important, the police report stated that James Cummings, *(testified for the state)* picked up the discovery on the 19th of September, and turned it over to the District Attorneys office. But Defendant-Appellant didn't get the discovery until October 9th. Time that the discovery is in the hands of the police, is counted as in custody of the state. *Kyles v Whitley, 514 US 419 (1995).* The Plaintiff-Respondent knew that the trial was coming, had the discovery in his possession, but decided not to give it to Defendant-Appellant until the 11th hour before trial. Defendant-Appellant cannot see how this could not be done other than on purpose.

After the trial, Defendant-Appellant was looking through discovery and found the forged credit card receipt. (*APP 3a).* Had Defendant-Appellant had the forged credit card receipt for the trial, he could have been able to impeach the state's witness. During the trial, Defendant-Appellant asked the witness if she put any of the money in her pocket. The witness stated "NO". (*Jury Trial, at page 68).*

Further, Defendant-Appellant filed his discovery motion in May of 2019. There isn't any good reason why the Plaintiff-Respondent waited until late September to get the discovery. It is more believable that Plaintiff-Respondent had the discovery all along, and waited until the 11th hour to send it to Defendant-Appellant.

> ***4. Did the Prosecutors Lies During His Opening Statement, About Defendant-Appellant Being in Jail On This Charge, Render the Trial Unfair, on the Grounds that, Among Other Things, it Destroyed the Presumption of Innocence.***

It has been hornbook law for years that a prosecutor cannot lie to a jury. Because it conflicts with their Oath and Bond. It also alters the trial, and in this case, at the outset of the trial. The 14th Amendment of the Constitution demands that a defendant in a criminal case be given Due Process. The Plaintiff-Respondent outright lying to the jury, does not satisfy that process due.

In the case at hand, Plaintiff-Respondent lied to the jury by telling them that I was arrested and jailed on this charge. (*Jury trial at page 58).* a fact that is simply not true. *(Id. At 60).*

5. That the Plaintiff-Respondent Denied Defendant-Appellant his Right to a Fair Trial, When During Closing Arguments the Plaintiff-Respndent Brought up the Fact That the Defendant-Appellant Didn't Testify.

In any criminal trial in the United States, the defendant has a Constitutional Right to testify. They also have a Constitutional Right not to testify. This right has its roots in the 5th Amendment. Further, if a defendant elects not to testify, the prosecutor cannot bring up to the jury about the defendant's silence. Griffin v California, *380 US 609, 615 (1965).* Even indirect comments about the defendant's silence will violate the privilege. State v Hoyle, *(Wis Court of Appeals, District III, April 26th 2022).*

> In the case at hand, Plaintiff-Respondent mentioned the fact that Defendant-Appellant didn't testify on more than one occasion. By saying "her testimony is uncontradicted. Nobody else testified. Nobody else could Contradict that testimony. You heard no contradictory evidence at all about what she said". "And there is no evidence that he did pay, ... None, not a shred of evidence from the witness stand" Among others. (*Jury Trial at 138-143).*

It should also be noted that in Hoyle, this Court reversed, and the Plaintiff-Respondent's actions in the case at hand were far more eggregrious than in Hoyle.

9. That the Real Controversy Was Never Fully Tried, And That the Cumulative Effect of the Violations Requires Reversal of the Conviction.

The real controversy was never fully tried, on the grounds that the Plaintiff-Respondent failed to turn over evidence (that contained a forged credit card receipt) within a reasonable time.

This case must be reversed on the grounds that I turned down a plea agreement and went to trial, because I was innocent. Had I had that forged credit card receipt, I may have been able to Pressure Plaintiff-Respondent to dismiss, or a more favorable plea agreement. Or I could have used it to impeach Rachel Livingston on the stand.

The cumulative effect requires reversal on the grounds that Defendant-Appellant was forced to go to jury trial, with no favorable evidence, and a state's witness that lied, when she said that she din't put any money in her pocket. The forged credit card says otherwise. The 6th and 14th Amendments demand more.

10. There was Insufficient Evidence to Convict.

The only witness to testify for the state that was at the motel was Rachel Livingston. (*Because Plaintiff-Appellant told the jury at the closing arguments that Officer Cummings had no firsthand knowledge of what happened. He wasn't hiding in the bushes at the motel. (Jury Trial at 140)).* Livingston testified that she did not have any other evidence, other than her testimony that Defendant-Appellant didn't pay the motel. Livingston testified that it wasn't her duty to bring evidence. *(Jury Trial at 68,69).*

Appeals on sufficiency of the evidence is evidence so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. Appellate view is narrow, and most favorable to the conviction. *State v Hayes, 273 Wis 2d 1, (2004).*

Defendant-Appellant argues that one person, who is lying, that tesifies that someone committed a crime, but does not have any evidence, other than her lying word, is not enough to convict. If it is, then open the floodgates, because everybody could testify that everybody else committed a crime on them.

CONCLUSION

Based on the foregoing, Defendant-Appellant Respectfully Requests that the Judgement of Conviction be REVERSED.

Dated this 25th day of May, 2022

Thank You,

Richard Hoeft

FORM AND LENGTH CERTIFICATION

I Certify that this Brief Conforms to the requirements of Wisconsin Statutes Chapter 809, using a proportional seriff font. The length of the brief is 3229 words.

Dated this 25th day of May 2022

Thank You,

Richard Hoeft

APPENDIX