

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2449-CR

Cir. Ct. No. 2011CF44

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIEL A. BRITO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and STEPHANIE G. ROTHSTEIN, Judges. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Gabriel Brito appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether

the circuit court properly denied his motions to allow his counsel to withdraw and appoint new trial counsel. We affirm.

¶2 Brito was convicted of two counts of second-degree sexual assault in June 2012. His first trial ended in a hung jury and mistrial. In January 2012, after the State announced it would retry the case, Brito’s trial counsel orally moved to withdraw, at Brito’s request. Although it does not appear to have been expressly stated, it appears that the intent of the motion was for counsel to withdraw and for new counsel to be appointed, rather than for Brito to represent himself. The court denied the motion.

¶3 Trial counsel made a similar motion in March 2012, again at Brito’s request. The court denied that motion, and Brito elected to represent himself instead with standby counsel. After the second trial, Brito filed a postconviction motion claiming that the court erred in denying counsel’s motions to withdraw and appoint new counsel. The court denied that motion.

¶4 On appeal, Brito argues that the circuit court erroneously exercised its discretion in denying the two motions, and that the court failed to make a sufficient inquiry into the bases for the motions. We address the last argument first, because if we agree that the court’s inquiry was insufficient, we would not review the substance of its decisions on the motions.

¶5 The parties agree that the circuit court must make a “meaningful inquiry” into the reasons for the defendant’s motion. *See State v. Lomax*, 146 Wis. 2d 356, 362, 432 N.W.2d 89 (1988). Brito argues that the court’s inquiries here were too sparse to qualify as meaningful. We disagree. For both motions, the court asked Brito himself why he wanted to replace current counsel, and each time Brito described his disagreement with certain tactical or legal decisions that

counsel had made. Brito argues that the court should have made a detailed inquiry into all of the various specific disagreements that Brito had with counsel in earlier proceedings, but we do not read the case law to require such a detailed inquiry.

¶6 Brito also argues that the court erroneously exercised its discretion in denying the motions to replace counsel. We review decisions on such motions for erroneous exercise of discretion. *State v. Jones*, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. Brito argues that the circuit court should have granted his motions because the situation met one of the applicable factors, namely, that the alleged conflict with counsel “was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.” See *Lomax*, 146 Wis. 2d at 359.

¶7 As written, this test is phrased in the past tense (“likely resulted”). The test is apparently meant for use by a circuit court in considering a postconviction motion or by an appellate court reviewing a case in which the defendant’s motion was denied, and the defendant then went to trial represented by the unwanted attorney, giving the reviewing court a chance to consider the actual conduct of the trial counsel and the interaction between unwanted counsel and defendant. Here, however, Brito discharged the attorney and represented himself. Accordingly, in this situation we see this factor as a prospective one, meaning that we will look at whether the record *at the time of the circuit court’s decision* to deny the motion showed that the conflict between Brito and counsel was so great that it *was likely to result* in a total lack of communication that would prevent an adequate defense and frustrate a fair presentation in the second trial. Viewed from this perspective, Brito has not persuaded us that the court erroneously exercised its discretion.

¶8 Brito’s argument is based mainly on the difficulties between Brito and trial counsel up to the time of the motions, including during the first trial. Assuming without deciding that Brito is correct that his earlier communication with counsel was not easy or without conflict, he has not shown that the circuit court was presented with a showing of a past “total lack” of communication, or that the history and information before the court pointed toward an inadequate defense going forward. Beyond the history of some difficulties in communication, Brito does not appear to point to anything new that had happened at the time of his two motions in early 2012 that should have caused the court to expect that communication at the second trial would be worse than at the first.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

