Appeal No. 2020AP1728-CR **Cir. Ct. No. 2017CF5864**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERCY ANTIONE ROBINSON,

DEFENDANT-APPELLANT.

FILED

April 19, 2022

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brash, C.J., Dugan and White, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

When a warrantless arrest is made, the United States Supreme Court has established that a probable cause determination made within forty-eight hours of the arrest is timely under the United States Constitution. ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991). Milwaukee County employs a process to comply with this mandate by having a judicial officer review a sworn affidavit from law enforcement to determine if probable cause for the arrest exists and to set initial bail. This procedure is accomplished by an all-paper review and the

completion of a CR-215 form. The arrested person does not appear in person, but is included on the distribution list after the determination is made.

Wisconsin courts have only addressed the CR-215 procedure specifically in one unpublished decision. ***State v. Garcia*** ("***Garcia I***"), 2016AP1276-CR, unpublished slip op. (WI App April 10, 2018). In ***Garcia I***, this court held that the attachment of the right to counsel was not triggered by the CR-215 procedure because the accused did not physically appear before a court official and because the form did not charge the accused, but merely set forth probable cause for the arrest. On review, the Wisconsin Supreme Court split evenly and affirmed this court's decision in a per curiam order. *See* ***State v. Garcia ("Garcia II")***, 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528.

However, there are multiple federal district court decisions concluding that the attachment of the Sixth Amendment right to counsel is triggered by the CR-215 procedure. Most recently, a magistrate court granted *habeas corpus* to Garcia based on his argument that he was denied his right to counsel during an identification lineup held subsequent to the CR-215 probable cause and bail determination procedure. *See* ***Garcia v. Foster ("Garcia III")***, No. 20-CV-336, 2021 WL 5206481 (E.D. Wis. Nov. 9, 2021).[1]

Because of the lack of mandatory authority and the split by our supreme court in the treatment of the CR-215 procedure and its impact on criminal justice, we certify this question to the Wisconsin Supreme Court:

[1] We note that an appeal of the decision in ***Garcia III*** is pending in the Seventh Circuit.

Whether the CR-215 procedure triggers the attachment of the Sixth Amendment right to counsel, which would then entitle an accused person to have the right to counsel for any subsequent "critical stage" of the legal proceedings.

BACKGROUND

This case begins with a bank robbery on December 18, 2017, when there was an armed robbery at a bank on West Capitol Drive in Milwaukee. The robber passed a note to a teller demanding money with a threat of having a gun. The teller gave a description of the robber to police. The police distributed still images from surveillance camera footage to local news media, which resulted in an anonymous caller notifying police that she recognized Robinson from the images. After further investigation, the police arrested Robinson on December 19, 2017.

On December 21, 2017 (within forty-eight hours of the time of arrest), a Milwaukee County Circuit Court Commissioner reviewed and signed a CR-215 form, finding that there was probable cause to believe that the arrested person—Robinson—committed the offense listed in the statement from the arresting officer, and setting bail at $35,000. On December 22, 2017, a Milwaukee Police detective conducted a live identification lineup that included Robinson. After viewing the lineup, the teller identified Robinson as the person she saw commit the bank robbery. On December 23, 2017, the State issued the criminal complaint charging Robinson with a single count of robbery of a financial institution.

The case proceeded to a trial, at which the jury found Robinson guilty of the offense. The court sentenced Robinson to a term of ten years, evenly bifurcated between initial confinement and extended supervision. Robinson

moved for postconviction relief, alleging that he received ineffective assistance of counsel. After requesting additional briefing on when the right to counsel attaches, the circuit court denied Robinson's motion. Robinson appealed; after his appeal was initiated, he provided notice to the court that the federal decision granting *habeas corpus* in ***Garcia III*** may impact our review.

DISCUSSION

This issue arises out of the jurisprudence for two constitutional rights: the right to a timely determination of probable cause for an arrest under the Fourth Amendment and the right to the effective assistance of counsel at critical stages of prosecution under the Sixth Amendment.

The United States Supreme Court held that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention." ***Gerstein v. Pugh***, 420 U.S. 103, 126 (1975). The ***Gerstein*** court acknowledged that pretrial procedures vary by state, and that as long as probable cause is determined in a prompt and timely manner, it could be made independently; "at the suspect's first appearance before a judicial officer"; or "incorporated into the procedure for setting bail or fixing other conditions of pretrial release." ***Id.***, 420 U.S. at 123-24. It further held that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." ***Id.*** at 122. The United States Supreme Court refined the ***Gerstein*** holding in ***Riverside***, when it concluded that a "jurisdiction that provides judicial

determinations of probable cause within 48 hours of arrest will" comply with the prompt and timely requirements in ***Gerstein***. ***Riverside***, 500 U.S. at 56.[2]

Additionally, the United States Supreme Court held that the right to counsel guaranteed by the Sixth Amendment attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ***Kirby v. Illinois***, 406 U.S. 682, 689 (1972) (plurality opinion). The application of this right was refined in ***Rothgery v. Gillespie County***, 554 U.S. 191, 198 (2008). There, the United States Supreme Court held that a person accused in Texas had been wrongly denied counsel at the Article 15.17 hearing, which combined "the Fourth Amendment's required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him." ***Id.*** at 195 (citation and footnote omitted). It clarified that the rule that the right to counsel "attaches when the government has 'committed itself to prosecute'" did not depend on "prosecutorial awareness." ***Id.*** at 206-207 (citation omitted). Instead, an "accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution[.]" ***Id.*** at 207. "By that point, it is too late to wonder whether he is 'accused' within the meaning of the Sixth Amendment, and it makes no practical sense to deny it." ***Id.***

[2] Wisconsin adopted the forty-eight hour rule in ***State v. Koch***, 175 Wis. 2d 684, 499 N.W.2d 152 (1993). In accord with ***Riverside***, our supreme court concluded that the "probable cause determination can be made at a nonadversarial proceeding[;] the arrested person is not required to physically appear before the judge"[;] and it "can be made at the initial appearance or in combination with any other pre-trial proceeding[.]" ***Koch***, 175 Wis. 2d at 698-99.

Having reviewed the law, we now turn to the crux of the issue, whether the attachment of the Sixth Amendment right to counsel is triggered by Milwaukee County's CR-215 procedure. In this process, a judicial officer reviews a sworn affidavit, makes a probable cause determination for the arrest, sets bail, and signs a CR-215 form that lists the offense(s) that the law enforcement officer who submitted the form believes the arrestee committed.[3] Those offenses are subject to review by the District Attorneys Office before an accused may be charged in a criminal complaint.[4] Robinson argues that the attachment of his Sixth Amendment right to counsel was triggered by the CR-215 procedure because that marked the commencement of adversarial criminal proceedings against him. Thus, he was entitled to the assistance of counsel on December 22, 2017, when the police conducted a live lineup in which the bank teller identified him. This

[3] In ***Garcia I***, we reviewed the CR-215 procedure as follows:

> In Garcia's case, the motion hearing testimony was very clear that the probable cause document did not accuse or charge Garcia but merely, as required, set forth to a neutral magistrate the probable cause for the *arrest*. When trial counsel asked the detective about the process for the CR-215 form and what gets written on it, the detective answered, "You're writing the probable cause for this person *being arrested for this offense*." When the detective was asked if the determination was a court proceeding, he answered, "Not a court proceeding. We bring it to the D.A.'s office and stuff *later for charging*. But it's not something that it goes with him for the—transfer in to the jail." (Emphasis added.) The detective also testified that the CR-215 was not taken to the D.A.'s office to get approved. When asked to confirm that there were no criminal charges filed at that time, he responded, "Correct."

State v. Garcia ("***Garcia I***"), 2016AP1276-CR, unpublished slip op. ¶28 (WI App April 10, 2018).

[4] Although the arrested person is on the distribution list of the CR-215 form, the record is unclear when or how that arrested person is given a copy of the form in the specific cases of Robinson or Garcia or as a general rule.

occurred the day before the criminal complaint was issued on December 23, 2017, and two days before his initial appearance hearing on December 24, 2017.

In our analysis in ***Garcia I***, we noted that CR-215 procedure "is the mechanism Milwaukee County employs to satisfy the requirements" of ***Gerstein*** and ***Riverside***. ***Garcia I***, 2016AP1276-CR, ¶21. This court distinguished Milwaukee County's procedure from Gillespie County's procedure in ***Rothgery*** that triggered a right to counsel. We interpreted ***Rothgery*** to establish that "there [are] three requirements before the right to counsel attached: (1) a personal appearance; (2) a formal accusation; and (3) restrictions on liberty[.]" ***Garcia I***, 2016AP1276-CR, ¶25. First, we concluded that Garcia did not make a personal appearance before a judicial officer. ***Id.***, ¶27. Second, this court distinguished that "the sworn affidavit form" used in ***Rothgery*** stated "that the defendant was 'charged.'" ***Garcia I***, 2016AP1276-CR, ¶28 (quoting ***Rothgery***, 554 U.S. at 196). In contrast, the CR-215 form "did not accuse or charge Garcia but merely, as required, set forth to a neutral magistrate the probable cause for the arrest." ***Garcia I***, 2016AP1276-CR, ¶28. We noted that the CR-215 form was not taken to the District Attorney's office and that charging decisions later occur within that office. ***Id.*** Finally, this court concluded that the "setting of bail does not transform a probable cause determination hearing into an 'adversary criminal judicial proceeding' absent the existence of the remaining elements—'the first appearance before a judicial officer at which a defendant is told of the formal accusation against him.'" ***Id.***, ¶30 (quoting ***Rothgery***, 554 U.S. at 195).

Conversely, the United States District Court—Eastern District of Wisconsin has analyzed this issue in multiple decisions, reaching a conclusion about the CR-215 procedure that is directly opposite to this court's decision in ***Garcia I***. *See* ***United States v. West***, No. 08-CR-157, 2009 WL 5217976 (E.D.

Wis. Mar. 3, 2009). The ***West*** court, in comparing its case to ***Rothgery***, described the CR-215 procedure as follows:

> The process in Milwaukee County may be less formal, and certainly less time consuming than that utilized in Gillespie County, but substantively, the results are the same. A judicial officer reviewed a sworn statement outlining the factual basis for the charges against the arrestee, the judicial officer found probable cause, the judicial officer established bail for the arrestee, and the arrestee was informed of the charges against him.

Id. at *9.[5] *See also* ***United States v. Mitchell***, No. 15-CR-47, 2015 WL 5513075, at *3 (E.D. Wis. Sept. 17, 2015), *aff'd*, 657 F. App'x 605 (7th Cir. 2016); ***Jackson v. Devalkenaere***, No. 18-CV-446-JPS, 2019 WL 4415719, at *2 (E.D. Wis. Sept. 16, 2019); ***Ross v. Jacks***, No. 19-CV-496-JPS, 2019 WL 4602946, at *2-3 (E.D. Wis. Sept. 23, 2019); ***Garcia III***, 2021 WL 5206481, at *5.

Because of the lack of mandatory authority on this issue, Wisconsin Supreme Court review is necessary to clarify for Wisconsin courts whether the attachment of the right to counsel is triggered by the CR-215 procedure, thereby triggering a right to counsel for subsequent critical stages. We consider this issue to be of statewide importance to develop a uniform adherence to the constitutional requirements set forth in ***Riverside*** and ***Rothgery***. We ask the court to accept

[5] We note that that federal decisions presume that the arrestee is informed of the offenses via the CR-215 form being given to the arrestee.

certification to provide a clear answer on this issue and eliminate confusion between the state and federal courts.[6]

[6] Robinson's appeal also raises several additional claims of ineffective assistance of counsel: (1) that trial counsel failed to call witnesses who did not identify him as the robber; (2) that trial counsel failed to raise a defense of a known or unknown third-party perpetrator; and (3) that trial counsel failed to call an expert witness on eyewitness identification. He also challenges the sufficiency of the evidence to support his conviction.

We do not believe that these additional issues, in and of themselves, are worthy of certification, and we, therefore, do not address them further. However, as our supreme court is aware, if it were to accept this certification, it would acquire jurisdiction over Robinson's appeal in its entirety, including all issues raised before this court. *See* ***State v. Denk***, 2008 WI 130, ¶29, 315 Wis. 2d 5, 758 N.W.2d 775.