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DISTRICT IV

November 5, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP298-CR

State of Wisconsin v. Richard H. Harrison (L.C. # 2010CF88)

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

Richard Harrison appeals a judgment convicting him of burglary, theft and resisting an officer, and an order denying his motion for postconviction relief. The primary issue on appeal is whether Harrison is entitled to a new trial because the trial judge failed to honor his substitution request. After reviewing the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ For the reasons discussed below, we reverse and remand for a new trial.

At any time prior to arraignment and before making any motions to the circuit court, the defendant in a criminal action has a statutory right to request a substitution of the originally assigned judge. WIS. STAT. § 971.20(4). Once a timely substitution request has been made and approved as to form, “the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail,” unless the defendant or defense counsel, the prosecutor, the substituted judge and the substituting judge all sign and file an agreement to transfer the matter back to the substituted judge. WIS. STAT. § 971.20(9) and (11).

Here, the State concedes that Harrison filed a timely substitution request and that, after the request had been approved as to form, the chief judge of the district assigned a new judge to preside over the action. Through an apparent oversight, however, the original judge presided over all of the proceedings after the preliminary hearing, including Harrison’s trial, sentencing, and postconviction motion—without any signed agreement having been filed or another transfer order having been entered.

The State argues that the acknowledged violation of Harrison’s statutory substitution right should be deemed harmless error because Harrison received an otherwise fundamentally fair trial. However, the State cites no authority for the proposition that the harmless error

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

doctrine applies to the violation of a defendant's right to substitute a judge and has not persuaded us that existing case law permits, much less compels, that result.

We have noted on more than one prior occasion that allowing a substituted judge to reenter a case and preside over subsequent proceedings would vitiate WIS. STAT. § 971.20, effectively nullifying the defendant's right to substitute a judge. *See, e.g., State v. Austin*, 171 Wis. 2d 251, 256, 490 N.W.2d 780 (Ct. App. 1992) (citing *State v. Smith*, 106 Wis. 2d 17, 20-21, 315 N.W.2d 343 (1982)). We have further observed that the statutory substitution right is “unconditional” and not subject to an implied waiver by a defendant's failure to object to the substituted judge's continued participation in a case. *Id.* at 257.

The language we have used in *Austin* and other substitution cases is consistent with the general proposition that when a judge lacks “authority to act,” any judgment or order rendered by that judge is void for lack of jurisdiction. *See Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 129, 586 N.W.2d 68 (Ct. App. 1998). Additionally, we note that the requirement that a defendant submit his or her substitution request prior to being arraigned or bringing any motions is designed to make it apparent that the defendant has not “acceded to the trial jurisdiction of the assigned judge.” *State ex rel. Warrington v. Circuit Court for Shawano County*, 100 Wis. 2d 726, 731, 303 N.W.2d 590 (1981). In other words, the case law suggests that when the substitution statute refers to a judge lacking the “authority to act” it means that the court can no longer exercise jurisdiction over the matter.

For these reasons, we conclude that the judgment and order are void for lack of jurisdiction, and are not subject to harmless error analysis. In light of that determination, we need not address additional arguments raised by the parties.

Accordingly,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily reversed under WIS. STAT. RULE 809.21(1), and the matter is remanded for a new trial.

IT IS FURTHER ORDERED that the substituted judge is prohibited from presiding over any additional proceedings in this matter, absent a signed and filed agreement by the defendant, prosecutor, substituted judge and substituting judge.

Diane M. Fremgen
Clerk of Court of Appeals