COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1076

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BARBARA A. BUETTNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County: JOSEPH E. SCHULTZ, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Deininger and Jones,[1] JJ.

VERGERONT, J. Buettner appeals from an order denying her motions for relief from a judgment of conviction and sentence for delivery of a

[1] Circuit Judge P. Charles Jones is sitting by special assignment pursuant to the Judicial Exchange Program.

Schedule II controlled substance in violation of § 961.41(b), STATS.[2] She contends that the trial court erred in denying her motion to enlarge the time to file motions for postconviction relief and in deciding her postconviction motions without an evidentiary hearing. She also contends that the sentencing court violated § 967.08, STATS., in conducting the plea hearing and sentencing by telephone. For the reasons we explain below, we exercise our discretionary powers of reversal and remand to the trial court for further proceedings on the motions.

BACKGROUND

The complaint charging Buettner with delivery of a Schedule II controlled substance was filed on January 28, 1994. On April 19, 1994, a court proceeding took place with the judge sitting in Dodge County, the prosecutor in Green Lake County appearing by telephone, and Buettner and defense counsel in Waushara County appearing by telephone.[3] The hearing began with the court stating its understanding that Buettner had previously entered a plea of not guilty to the information. Defense counsel corrected the court, explaining that only the initial appearance and bond setting had occurred; the defendant had not yet entered a plea. Defense counsel then waived the preliminary hearing and the reading of

[2] Buettner was charged with violating § 161.41(1)(b), STATS., 1993-94. This section was amended and renumbered. *See* 1995 Wis. Act 448, § 323.

[3] The complaint was filed in Waushara County. The court ordered that a special prosecutor be appointed and the district attorney from Green Lake County was appointed. Upon Buettner's motion for a substitution of judge, the Honorable Joseph E. Schultz was assigned to the case, and his office was in Dodge County.

the information on behalf of Buettner, and Buettner entered a no contest plea to the information.[4]

In response to the court's question, the prosecutor explained what the State would prove, and defense counsel stated that there was a factual basis for the plea, as stated in the probable cause section of the complaint. When responding to further questioning by the court, defense counsel informed the court that Buettner had completed and signed a guilty plea and waiver of rights questionnaire and he would mail it to the judge's office.[5] The court then directed its questions to Buettner. She answered that she did execute the guilty plea and waiver of rights questionnaire; she was satisfied with the representation of her attorney; she graduated from high school in 1974 and had continuing instruction on the computer system through her job; and she understood that in pleading no contest (which, the court explained, was "really just about the same as a plea of guilty"), she was relieving the State of the obligation to prove her guilt beyond a reasonable doubt before a jury of twelve persons.

Next, the court asked Buettner if she had any questions. Defense counsel stated that Buettner had a question for him. Their discussion took place off the record, and defense counsel then informed the court that Buettner had no other questions. The court then asked Buettner if she understood that she was

[4] It is unclear from the record what type of proceeding was contemplated when the April 19, 1994 hearing was scheduled. The application for a judicial assignment, made in response to Buettner's request for a substitution of judge, states that she waived the time limits for holding the preliminary hearing, and that the next activity scheduled or to be scheduled was the preliminary hearing. However, from various comments of the court during the proceeding, it appears that the court had been informed that Buettner wished to enter a plea of no contest or guilty pursuant to a plea agreement and to be sentenced at the proceeding.

[5] The record indicates that a plea questionnaire was filed with Waushara County circuit court on April 19, 1994.

going to be convicted and sentenced that day, and she answered "yes." The court found there was a factual basis for the plea; Buettner had executed a guilty plea questionnaire and waiver of rights; she understood her constitutional rights and waived those freely, intelligently and voluntarily; and she freely, voluntarily and intelligently made her plea of no contest. The court found her guilty of the charge.

The attorneys then explained the terms of the plea agreement, which included a sentence of three years' prison imposed but stayed, three years' probation, and certain other conditions. The court concluded that the punishment agreed upon was appropriate to the offense and sentenced Buettner according to the agreement.

After entry of the judgment of conviction, the record shows no activity until July 2, 1996, when postconviction counsel filed a motion on Buettner's behalf to withdraw her plea. The motion asserted that "new evidence has arisen which establishes the innocence of the defendant" and "the acceptance of the plea was defective and should be set aside in the interest of justice." The motion stated that it was brought pursuant to § 971.08, STATS.; ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986); ***Ernst v. State***, 43 Wis.2d 661, 170 N.W.2d 713 (1969); ***State v. Reppin***, 35 Wis.2d 377, 151 N.W.2d 9 (1967). No affidavit or brief accompanied the motion.

On October 14, 1996, Buettner, through counsel, filed a motion to permit her to file a petition for postconviction relief under § 809.30, STATS.,[6] "in

[6] Section 809.30, STATS., provides in pertinent part:

(1) DEFINITIONS. In this section:

(continued)

the interests of justice" and on the grounds set forth in the accompanying affidavit. Counsel's affidavit stated that based on his investigation after being retained by Buettner, he believed that Buettner's Fifth Amendment rights were violated when she gave a statement to the police and that trial counsel had failed to take a number of actions concerning investigations, defenses, the plea and sentencing. He also stated that Buettner "reserved the right" to challenge the telephone aspect of the plea and sentencing hearing and other aspects of the plea proceeding.

A hearing on Buettner's motions took place on October 14, 1996. The court began by stating that the hearing was on the motion to withdraw the plea and the motion to permit Buettner to file a petition for postconviction relief. Buettner's attorney explained why he filed the latter motion and explained that the court needed to rule on that motion first. He also said that it probably would be necessary for the parties to "file any appropriate additional motions or arguments or briefs for the court to consider prior to making a decision more on the merits." The prosecutor stated that he had just received the petition for postconviction relief a few minutes earlier, and that he would like the opportunity to study it and to respond. The court then set up a briefing schedule, directing Buettner's attorney to file the first brief "setting forth the authority you rely on," then giving the prosecutor the opportunity to respond and Buettner the opportunity to reply.

> (a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under ….
>
> ….
>
> (b) Within 20 days of the date of sentencing, the defendant shall file in the trial court and serve on the district attorney a notice of intent to pursue postconviction relief.

Buettner's brief was entitled "Brief in Support of Postconviction Relief." It requested an expansion of time limits to permit Buettner to seek postconviction relief under §§ 809.30 and 974.06, STATS.[7] It asserted that Buettner had been denied effective assistance of counsel in violation of her Sixth Amendment rights, and listed and discussed a number of instances of ineffectiveness of trial counsel, including not adequately informing her of, and protecting, her right to appeal. The brief also contended that the court should permit the plea withdrawal because of manifest injustice and that the "telephonic waiver of preliminary hearing, arraignment, plea and sentencing" contravenes § 807.13, STATS.[8]

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[7] Section 974.06(1), STATS., provides:

> (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[8] Section 807.13, STATS., provides in part:

> Telephone and audio-visual proceedings. (1) ORAL ARGUMENTS. The court may permit any oral argument by telephone.
>
> (2) EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audio-visual means, subject to cross-examination, when: ….
>
> ….
>
> (3) CONFERENCES. Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is

(continued)

In the State's responsive brief, the prosecutor argued that there was no basis in the record to support the conclusory allegations contained in Buettner's briefs and motions. The record showed, the State contended, that the plea had been knowingly, voluntarily and intelligently entered, and that Buettner was not entitled to an evidentiary ***Machner*** hearing[9] on her claim of ineffective assistance of counsel based solely on conclusory allegations. The State also argued that the case cited by Buettner in support of her argument on the impropriety of the telephonic nature of the proceedings did not apply to a plea and sentencing based on a stipulation of the parties.[10]

The trial court issued a memorandum decision and order denying Buettner's motions. Regarding the July 2, 1996 motion for withdrawal of her plea, the court concluded that Buettner had not made the requisite prima facie showing that her plea was not voluntarily, knowingly and intelligently entered. With respect to the later motion to enlarge the time for postconviction motions, the court concluded that it was without authority to enlarge the time under § 809.30, STATS., because only the court of appeals had statutory authority to do that. The court also concluded that Buettner did not need an enlargement of time to file a § 974.06, STATS., motion, but that the conclusory affidavit filed by Buettner's counsel

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> practical to do so, conferences in civil actions and proceedings may be conducted by telephone.

[9] A ***Machner*** hearing is a hearing at which trial counsel testifies and explains his or her reasons underlying the handling of the case. It is necessary to ultimately prevail on a claim of ineffective assistance of counsel. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (1979).

[10] Buettner cited ***Town of Geneva v. Tills***, 129 Wis.2d 167, 178, 384 N.W.2d 701, 705 (1986), which held that a witness' testimony by telephone over a party's objection in a civil trial denies the party his common law right to meaningful cross-examination.

regarding ineffective assistance of trial counsel "did not take the place of a ***Machner*** hearing."

DISCUSSION

We first address Buettner's argument that the trial court erred in denying her motion to enlarge time to pursue postconviction relief under either §§ 809.30 or 974.06, STATS. This involves the application of a statute to undisputed facts, a question of law, which we review de novo. *See* ***Gloria A. v. State***, 195 Wis.2d 268, 272, 536 N.W.2d 396, 398 (Ct. App. 1995). Section 809.82, STATS.,[11] authorizes the court of appeals to enlarge the time periods prescribed in the rules of appellate procedure, with certain exceptions. This authority includes time periods prescribed under § 809.30 governing appeals and postconviction motions by defendants in felony cases. The trial court correctly decided that it lacked the authority to extend the time limit for filing a notice of

[11] Section 809.82, STATS., provides:

> (1) COMPUTATION. In computing any period of time prescribed by these rules, the provisions of s. 801.15 (1) and (5) apply.
>
> (2) ENLARGEMENT OR REDUCTION OF TIME. (a) Except as provided in this subsection, the court upon its own motion or upon good cause shown by motion, may enlarge or reduce the time prescribed by these rules or court order for doing any act, or waive or permit an act to be done after the expiration of the prescribed time.
>
> (b) Notwithstanding the provisions of par. (a), the time for filing a notice of appeal or cross-appeal of a final judgment or order other than in an appeal under s. 809.30 or 809.40 (1) may not be enlarged.
>
> (c) The court may not enlarge the time prescribed for an appeal under s. 809.105 without the consent of the minor and her counsel.

intent to pursue postconviction relief under § 809.30(2)(b) or other time limits in that section. Such a request must be made to this court by motion. Although Buettner has not filed such a motion with this court, if we were to consider her October 14, 1996 motion as one directed to us, we would deny the motion. Buettner has not shown good cause for failing to meet the statutory deadlines or to request an enlargement of time until October 14, 1996.

The trial court was also correct that Buettner did not need an enlargement of any statutory time period for filing a § 974.06, STATS., motion. Procedures for such a motion are not governed by § 809.30, STATS. Section 809.30(2)(L). A prisoner in custody under sentence of a court may bring a motion under § 974.06(1), and such a motion may be made at any time. Section 974.06(2).

Since the trial court concluded that Buettner could properly file a motion for relief under § 974.06, STATS., it reviewed her motions to determine whether she was entitled to relief under § 974.06. The trial court concluded that she was not entitled to any relief, and on the pleadings before the trial court, this was a correct conclusion.

First, the scope of § 974.06, STATS., motions are limited to matters of constitutional or jurisdictional dimensions. ***State v. Carter***, 131 Wis.2d 69, 77, 389 N.W.2d. 1,4 (1986). Insofar as Buettner based the motion for withdrawal of her plea on a violation of statutes designating which proceedings may be conducted by telephone,[12] such a statutory violation in and of itself may not be

[12] Although in her brief before the trial court, Buettner relied on § 807.13, STATS., in support of her argument that there was no statutory authorization for the telephone proceedings that were conducted, on appeal she relies on § 967.08, STATS., which provides in pertinent part:

(continued)

Telephone proceedings. (1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audio-visual means, if available. If the proceeding is required to be reported under SCR 71.01 (2), the proceeding shall be reported by a court reporter who is in simultaneous voice communication with all parties to the proceeding. Regardless of the physical location of any party to the call, any plea, waiver, stipulation, motion, objection, decision, order or other action taken by the court or any party shall have the same effect as if made in open court….

(2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).

(c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

(c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23 (6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11 (2) (b).

(f) Motions to postpone, including those under s. 971.29.

raised on a § 974.06 motion. *See* ***Carter***, 131 Wis.2d at 81-83, 389 N.W.2d at 5-6. Insofar as Buettner seeks withdrawal of her plea on the ground that it was not knowingly, voluntarily and intelligently entered, that is a constitutional claim that may properly be brought on a § 974.06, STATS., motion.[13] *See* ***id***. Buettner's claim that she had ineffective assistance of counsel when she entered her plea is also a basis for a request to withdraw a plea. *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 336 (Ct. App. 1993). And, since effective assistance of counsel is guaranteed by the Sixth Amendment to the constitution, *see* ***Strickland v. Washington***, 466 U.S. 668 (1984), a request for a plea withdrawal on this ground may also be made in a § 974.06 motion.[14]

Under ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986), in order to make a prima facie showing that a plea was not knowingly, voluntarily and intelligently entered, the defendant must show that the plea was accepted in violation of § 971.08, STATS., and other mandatory procedures. The defendant must also allege lack of knowledge or understanding of the information which should have been provided at the plea hearing. If the defendant makes out a prima facie case, the burden then shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily made. ***Id.*** at 275, 389 N.W.2d at 26.

A claim of ineffective assistance of counsel requires that the defendant prove that counsel's performance was deficient and that the deficient

[13] We recognize that the telephonic nature of the proceedings may have a bearing on whether the plea was knowingly, voluntarily and intelligently entered.

[14] Buettner's July 2, 1996 motion for a plea withdrawal also alleged newly discovered evidence. Buettner does not mention this as a basis for withdrawing her plea in her briefs before this court and we therefore do not address this.

performance was prejudicial. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

Although a motion for plea withdrawal based on a claim that the plea was not knowingly, voluntarily and intelligently entered and that counsel was ineffective may properly be brought under § 974.06, STATS., the movant is not automatically entitled to an evidentiary hearing on either ground. The trial court has the discretion to summarily deny a postconviction motion for a plea withdrawal if the defendant fails to allege sufficient facts in the motion to raise a question of fact, or presents only conclusory allegations. ***State v. Bentley***, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996). A motion presents only conclusory allegations if it does not contain factual assertions of sufficient specificity to allow the court to meaningfully assess the defendant's claim for a plea withdrawal. ***Id***.

Buettner's motions were a few lines each and contained only legal conclusions. The second motion was accompanied by an affidavit of postconviction counsel stating various failures of trial counsel, such as failure to investigate, failure to raise certain issues and failure to explain consequences and alternatives to Buettner. The affidavit, however, provided no explanation of how those alleged failures prejudiced Buettner or affected her decision to enter a plea. These conclusory allegations are similar to the ones that we held in ***Washington***, 176 Wis.2d at 216, 500 N.W.2d at 336, were legally insufficient to trigger an evidentiary ***Machner*** hearing. They are even more conclusory than the allegations that the supreme court found insufficient to entitle the defendant to an evidentiary hearing in ***Bentley***, 210 Wis.2d at 314-17, 548 N.W.2d at 355-57.

Buettner's allegation that her plea was not knowingly, voluntarily and intelligently entered for reasons other than ineffective assistance of counsel is similarly deficient. There is no statement, either in the motions, her counsel's affidavit, or her counsel's brief, explaining specifically what Buettner did and did not understand at the time she entered her plea and why it was not knowingly, voluntarily and intelligently made.

We conclude that the trial court properly exercised its discretion in deciding that Buettner's submissions did not entitle her to an evidentiary hearing. We could end our analysis here and affirm the trial court's order denying Buettner's motions. However, we are concerned that Buettner, because of the misunderstandings of her postconviction counsel, did not have the opportunity to present submissions that might have entitled her to an evidentiary hearing on her motions. We disagree with the implication in her appellate brief that the trial court is responsible for this lack of opportunity. There is no basis in the case law or in what took place at the hearing on October 14, 1996, for believing, as her postconviction counsel apparently did, that after filing briefs on the legal basis for the motions, Buettner automatically would have the opportunity for an evidentiary hearing based solely on the submissions already made. Nevertheless, the result of her attorney's misunderstanding is that the issue of whether she could present facts sufficient to entitle her to an evidentiary hearing was never presented to the trial court for decision.

Because significant constitutional rights may be involved, we conclude that we should exercise our discretionary power of reversal on the ground that reversal is necessary to accomplish the ends of justice because the real

controversy has not been tried.[15] We may exercise our discretionary power of reversal on this ground without finding the probability of a different result on retrial. *See* ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-74 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 492, 506, 451 N.W.2d 752, 757 (1990). We therefore reverse the trial court's order denying Buettner's motions insofar as they seek to withdraw her plea on the ground of ineffective assistance of counsel or on the ground that the plea was not knowingly,

[15] Section 752.35, STATS., provides:

> Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

voluntarily and intelligently entered.[16] This will give Buettner the opportunity to submit specific factual assertions that demonstrate the need for an evidentiary hearing on those grounds. The trial court is not, of course, required to grant an evidentiary hearing unless Buettner is entitled to one under the standards established in ***Bentley***.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[16] We may not exercise our discretionary power of reversal to reach the judgment of conviction that is collaterally attacked in a § 974.06, STATS., motion, *see* ***State v. Allen***, 159 Wis.2d 53, 55, 464 N.W.2d 426, 427 (Ct. App. 1990). However, our decision to reverse the order denying the motion is consistent with ***Allen***.

P. CHARLES JONES, J. *(Concurring).* I join the court in its mandate. I write separately solely to express my opinion that under the existing statutes, a trial court may not conduct a felony arraignment wherein the defendant enters a plea of guilty or no contest, and may not sentence following a felony plea of guilty or no contest by means of a telephonic proceeding pursuant to § 967.08, STATS.[17] My conclusion follows from an examination of §§ 967.09 and 971.04, STATS., as interpreted by the supreme court in ***State v. Vennemann***, 180 Wis.2d 81, 508 N.W.2d 404 (1993).

Section 967.08, STATS., was created by Wisconsin Supreme Court Order in October 1987. 141 Wis.2d xiii, xxvii-xxviii (1987). According to ***Vennemann***, 180 Wis.2d at 96 n.11, 508 N.W.2d at 410, the rule was developed by the Judicial Council and the Committee on Electronic Technology, as one of several which would allow certain judicial hearings and conferences to be conducted by telephone.

Section 967.08(2), STATS., sets out the specific criminal proceedings that may be conducted by telephone. It includes arraignment under § 971.05, STATS., but only "if the defendant intends to plead not guilty or to refuse to plead." Section 967.08(2)(d). It does not include a sentencing hearing.

Section 971.04(1), STATS., specifies at what proceedings a defendant "*shall* be present." (Emphasis added.) It provides:

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[17] Section 967.08, STATS., is set forth in its present form in the court's opinion at footnote 11.

> Defendant to be present.
>
> (1) Except as provided in subs. (2) and (3), the defendant shall be present:[18]
>
> (a) At the arraignment;
>
> (b) At trial;
>
> (c) At all proceedings when the jury is being selected;
>
> (d) At any evidentiary hearing;
>
> (e) At any view by the jury;
>
> (f) When the jury returns its verdict;
>
> (g) At the pronouncement of judgment and the imposition of sentence;
>
> (h) At any other proceeding when ordered by the court.

The ***Vennemann*** court concluded that being "present" as intended in § 971.04 means being "physically present" before the court. The court wrote:

> The legislature has listed with particularity [in § 971.04], stages of the criminal process, up to and including pronouncement of the judgment, at which the defendant must be *physically present*. (Emphasis added.)

Id. at 93, 508 N.W.2d at 409.

The ***Vennemann*** court also concluded "that when a defendant must be physically present, sec. 967.08 does not authorize the use of a telephone …." ***Id.*** at 96, 508 N.W.2d at 410. The court wrote about the limitations on the use of telephonic proceedings under § 967.08, STATS., as follows:

> Section 967.08 specifically enumerates proceedings intended to be included within the parameters of the statute.… We apply the principle of statutory construction

[18] Section 971.04(2), STATS., permits defendants charged with misdemeanors to authorize in writing their attorneys to appear on their behalf without their presence; and subsec. (3) addresses defendants who voluntarily absent themselves from trial without leave of the court, and authorizes their trials to proceed in their absence.

> that a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded. ***Id.***

Arraignment in a felony is a proceeding under § 971.04(1), STATS., that requires the defendant to be physically present before the court; it is a proceeding specifically excluded from § 967.08(2), STATS., unless the defendant pleads not guilty or stands mute. Imposition of sentence is specifically included in § 971.04(1); it is excluded from § 967.08(2). Under the direction of ***Vennemann***, I conclude that neither of these proceedings in a felony case may be conducted by telephone under the existing statutes.

The argument may be made that because the specific telephonic proceedings permitted under § 967.08(2), STATS., only require the request of either the State or the defendant, that where both parties request a proceeding by telephone, proceedings not listed in the statute can be conducted by telephone. I disagree.

First, the evolution of § 967.08, STATS., does not suggest an intent to broaden its use. The introductory language of subsec. (2) originally read: "The following proceedings may be conducted under sub. (1) with the consent of all parties. Consent may be given by telephone." Section 967.08(2), 1987-88. The supreme court amended the introductory language by Supreme Court Order on October 31, 1990, to read as follows: "The court may permit the following proceedings to be conducted under sub. (1) with the consent of the defendant. The defendant's consent and any party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone." Section 967.08(2), 1991-92. At that time, the court adopted the Judicial Council's opinion that the "appearances, motions and waivers listed in this subsection are rights of the

defendant." Judicial Council Committee Note, 1990, § 967.08. In 1995, the legislature amended the introductory portion of § 967.08(2) to state its current reading: "The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone." Section 967.08(2), 1995-96.

Although the statute has been modified from requiring consent of all parties, to requiring only the defendant's consent, to permitting either the defendant or the State to request that the proceeding be conducted by telephone, the permitted proceedings listed in the subsection have not changed.

Second, the statutory rule of construction, *expressio unius est exclusio alterius*, applies to § 967.08(2), STATS. The supreme court made this clear in ***Vennemann*** when it wrote that "a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded." ***Id.*** at 96, 508 N.W.2d at 410.

Therefore, a single party request or a joint request to hold a telephonic proceeding, in my opinion, may not include a proceeding which requires the defendant's physical presence under § 971.04(1), STATS., unless it is a proceeding specifically permitted under § 967.08(2), STATS.