COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1395-CR **Cir. Ct. No. 00-CF-151**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. GREVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. ***State v. Austin***, 171 Wis. 2d 251, 257-58, 490 N.W.2d 780 (Ct. App. 1992), establishes a bright-line rule that before a case can be returned to the substituted judge, an agreement for the transfer must be signed by the defendant or the defendant's attorney, the prosecutor and the substituted

and successor judges. Because a written agreement was never prepared or filed in this case, we reverse Thomas A. Greve's judgment of conviction.

¶2 Greve was charged in an amended information with two counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1) (1997-98),[1] as a persistent repeater under WIS. STAT. § 939.62(2m)(c). He filed a timely request under WIS. STAT. § 971.20(4) for substitution of Judge James L. Carlson. Judge Michael S. Gibbs was assigned to preside over the case. Shortly after the first status conference before Judge Gibbs, Greve's counsel was permitted to withdraw because he was moving to another area of the state.

¶3 At a later status conference before Judge Gibbs, Greve's new defense counsel advised the court that a plea agreement had been reached.

> MR. LETTENBERGER: Good morning, Your Honor.
>
> Attorney Frank Lettenberger appears on behalf of Tom Greve, who appears in custody.
>
> Judge, we do have an agreement in this matter. It was contemplated by the parties that this would be set back to the felony court with this Court's assent.
>
> [PROSECUTOR]: Do you want to do a plea here or—
>
> MR. LETTENBERGER: Actually, I haven't gone over it with him [Greve]. I've got everything done, but I haven't gone over it with him.
>
> Judge, if we could just set it for a 1:00, perhaps the first thing next week?

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The attorneys and the calendar clerk proceeded to schedule a plea hearing before the felony court. At no time during this status conference did the court or defense counsel advise Greve of who the presiding judge was in the felony court. Nor did anyone ask Greve if he agreed to make his plea in the felony court rather than before Judge Gibbs.

¶4 The plea hearing was conducted in front of Judge Carlson, who had previously been substituted by Greve, because he was the presiding judge in the felony court. Before the plea colloquy, the following exchange took place:

> THE COURT: Is that your agreement, Mr. Greve? You want to proceed today, sir, with entering your plea or do you want to have more time?
>
> MR. LETTENBERGER: He's ready to proceed today, your Honor.
>
> THE COURT: Is that correct, Mr. Greve?
>
> THE DEFENDANT: Well, it's hard for me right now.
>
> THE COURT: I can see that. So if you want to think it over?
>
> THE DEFENDANT: I'd like to, yeah.
>
> THE COURT: Well, is it set for trial?
>
> THE CLERK: It was set before Judge Gibbs. This file was assigned to Judge Gibbs. For the plea agreement they brought it back here.
>
> THE COURT: Is he going to be sentenced by Judge Gibbs?
>
> THE CLERK: No. I understand he will be sentenced by you.
>
> THE COURT: I think I should have it on the record that he's agreeing to that.
>
> THE CLERK: A record was made before Judge Gibbs.
>
> MR. LETTENBERGER: There was a record made on it.

THE COURT: Before Judge Gibbs who remanded it to this court?

MR. LETTENBERGER: Yes.

THE COURT: That is still your wish, Mr. Greve?

THE DEFENDANT: I don't know.

MR. LETTENBERGER: Talking about remanding it to Judge Carlson?

THE DEFENDANT: Yes, your Honor.

THE COURT: The matter can remain in this court as opposed to being before Judge Gibbs.

THE CLERK: I believe it was set for trial before Judge Gibbs.

MR. LETTENBERGER: What happened is attorney Goglin, because he terminated his practice, had to withdraw as counsel. I was appointed. We had a status date. We anticipated entering the plea here today. I'm not sure what Mr. Greve wants to do.

THE COURT: Well, a plea is a fairly final thing as far as I'm concerned. I don't let them be withdrawn. So if you want more time to think about it, fine. If you want it set for trial, we'll set it for trial. I'm sure that this is the type of case that normally is set for a fairly early on the calendar type of case.

[THE PROSECUTOR]: If it's going to be set for trial, we are demanding a speedy [trial] on behalf of the victim.

THE COURT: Don't want to push you one way or the other. It's got to be your free will before I accept your plea.

[THE PROSECUTOR]: And the understanding is if he doesn't take this plea agreement, and it's set for trial, that the plea agreement is withdrawn.

THE COURT: Right.

THE DEFENDANT: Let's go ahead with it then.

THE COURT: You are going to go ahead with the agreement as it is?

THE DEFENDANT: Yes.

¶5 The court than engaged in a plea colloquy with Greve. The court found that Greve entered the plea knowingly, freely and voluntarily after discussing the plea with his attorney. The court also found that a factual basis existed to support the plea, found him guilty of one count and dismissed the other count. During the plea colloquy, Greve was not questioned about the timely substitution request he had previously filed or whether he was willing to have Judge Carlson preside over his plea and sentencing. Sentencing was postponed for several months; eventually Greve was sentenced to twenty-five years in prison followed by fifteen years of extended supervision.

¶6 Greve filed a motion for postconviction relief seeking to have his conviction set aside. Citing ***State v. Smith***, 106 Wis. 2d 17, 20, 315 N.W.2d 343 (1982), he argued that since Judge Carlson had been properly substituted, he lost competency to preside over the plea hearing and the sentencing. Greve contended that under ***Austin***, 171 Wis. 2d at 257-58, his entry of a plea before Judge Carlson was not an implied waiver of his earlier substitution of the judge. While acknowledging that WIS. STAT. § 971.20(11) required a written stipulation signed by all parties before the action could be returned to him, Judge Carlson held that Greve had waived any objection he had by his conduct and he was judicially estopped from asserting that the failure to comply with the statute entitled him to have his plea and sentence set aside.

¶7 The question before this court involves an interpretation and application of various provisions of the judicial substitution statute, WIS. STAT. § 971.20. "The construction of a statute or the application of a statute to a particular set of facts is a question of law that we review independently." ***Lane v.***

Williams, 2000 WI App 263, ¶7, 240 Wis. 2d 255, 621 N.W.2d 922, *review denied*, 2001 WI 15, 241 Wis. 2d 211, 626 N.W.2d 809 (Wis. Feb. 7, 2001) (No. 00-0852).

¶8 In Wisconsin, a defendant in a criminal case has the right to have a new judge substituted for the originally assigned judge. ***Smith***, 106 Wis. 2d at 20. WISCONSIN STAT. § 971.20 provides the blueprint for the substitution of judges in the criminal court:

> **(4)** SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

The statute clearly prevents a substituted judge from presiding over subsequent proceedings in the case. ***Id.*** Section 971.20(9), provides:

> **(9)** JUDGE'S AUTHORITY TO ACT. Upon the filing of a request for substitution in proper form and within the proper time, 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.

The substituted judge can return to the case only under a limited set of circumstances described in § 971.20(11):

> **(11)** RETURN OF ACTION TO SUBSTITUTED JUDGE. Upon the filing of an agreement signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

¶9 In this case, Greve filed a timely request for the substitution of Judge Carlson. The request was granted and the case was assigned to Judge Gibbs. However, although Judge Gibbs presided over the arraignment and several status conferences, the case was transferred back to Judge Carlson for Greve's plea and

sentencing. There is no record of an agreement signed by Greve or his attorney, the prosecutor and Judges Carlson and Gibbs agreeing that the case would be returned to Judge Carlson. WIS. STAT. § 971.20(11).

¶10 We addressed the issue of the substituted judge presiding over proceedings after a timely request for substitution was filed in ***Austin***. In that case, Austin filed a timely request for substitution of Judge Rudolph T. Randa and eventually was sentenced by Reserve Judge Robert C. Cannon. ***Austin***, 171 Wis. 2d at 253. Subsequently, Austin's probation privileges were revoked and he appeared with new counsel before Judge Randa for sentencing. ***Id.*** at 254. New counsel failed to object to Judge Randa's authority to act in the case and Austin received a moderate prison sentence. ***Id.*** The postconviction court rejected Austin's postconviction motion relief, holding that his participation in the sentencing waived any objections Austin might have had to the authority of Judge Randa to impose sentence. ***Id.***

¶11 We observed that WIS. STAT. § 971.20(9) and ***Smith***, 106 Wis. 2d at 20-21, established that after Judge Randa was substituted from the case he had "no authority" to sentence Austin after revocation of his probation. ***Austin***, 171 Wis. 2d at 256. We then held that there must be strict compliance with the requirements of § 971.20(11); before the case may be returned to the substituted judge, a written agreement "signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge" must be filed.

¶12 In this appeal, the State's principal contention is that the lack of a contemporaneous objection to the plea and sentencing being conducted by Judge Carlson waived Greve's claim that Judge Carlson lacked the authority to preside.

In ***Austin***, the State also argued that Austin's failure to contemporaneously object to Judge Randa's participation in the sentencing was an implied waiver. ***Austin***, 171 Wis. 2d at 257. Specifically, the State asserted that Austin had waived his right to substitution "by undertaking conduct inconsistent with the substitution request." ***Id.*** We disposed of the State's waiver argument by explaining why deviation from the strict requirements of WIS. STAT. § 971.20(11) cannot be permitted:

> [D]eviation from the requirements would allow for substantial problems that are prevented by strict adherence to [§ 971.20(11)]. First, to find implied waiver in circumstances like these would be to condone carelessness among lawyers and courts. It is the responsibility of both lawyers and courts to check on previous substitutions as a matter of course. Second, to allow an implied waiver would serve to unfairly penalize less informed defendants who, because they appear pro se, or because they are represented by successor counsel or forgetful counsel, may not remember the substitution. While apparently acquiescent before the judge, they are still entitled to the protection of the substitution statute. Third, to allow an implied waiver would be to allow a new form of "forum shopping." Defendants, realizing that the first judge is more "lenient" than the second judge, could simply reappear before the first judge, hoping that busy clerks and prosecutors would not notice. Defendants unilaterally could create a second substitution. Such a unilateral loophole was explicitly proscribed by the sec. 971.20(11) requirement that both parties agree before a case is returned to the first judge.

Austin, 171 Wis. 2d at 257-58.

¶13 In this appeal, the State makes three additional arguments. First, the State argues that Greve expressly agreed that his case be returned to Judge Carlson and this was a waiver of the requirements of WIS. STAT. § 971.20(11). The record does not support the State's argument. All that was stated on the record at the status hearing before Judge Gibbs where the plea agreement was announced was

that there was an agreement to return the case to the "felony court." There is no confirmation in the record that Greve knew that Judge Carlson was presiding in "felony court." When Greve appeared before Judge Carlson, the initial colloquy did not delve into Greve's previous substitution of Judge Carlson. Rather, Judge Carlson abandoned making a record of Greve's acquiescence to having Judge Carlson preside over the plea and sentencing after the deputy clerk of court informed him that a record had been made before Judge Gibbs. There was no record made before Judge Gibbs of Greve agreeing to the case being returned to Judge Carlson, the judge he had previously substituted.

¶14 The State also asserts that Greve's guilty plea waived all nonjurisdictional defects, including the failure to comply with WIS. STAT. § 971.20(11). Finally, the State insists that the doctrine of judicial estoppel prevents Greve's argument that the lack of a written agreement transferring the case back to Judge Carlson barred the judge's presiding over the plea and sentencing.

¶15 These two arguments are an attempt to modify or circumvent the bright-line rule of ***Austin*** requiring strict compliance with WIS. STAT. § 971.20(11). The State's arguments must be addressed to the supreme court. We are not at liberty to overrule, modify or withdraw language in our prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore are constrained to follow the dictates of ***Austin***.[2] Because a written agreement

[2] The failure to comply with the requirements of the statute is not a problem in this state. In our research, we have not come across any case—state or federal, published or unpublished—addressing WIS. STAT. § 971.20(11) other than ***State v. Austin***, 171 Wis. 2d 251, 257-58, 490 N.W.2d 780 (Ct. App. 1992). In addition, only one unpublished decision cites to ***Austin*** for the proposition that strict compliance with the statute cannot be waived. *See* ***Walworth County v. Eugene H.***, Nos. 94-0702 and 94-1359, unpublished slip op. (Wis. Ct. App. Nov. 9, 1994).

signed by all of the principals to reassign the case to Judge Carlson was never filed as required by § 971.20(11), Judge Carlson did not have the authority to preside over Greve's plea and sentencing. Therefore, we reverse and remand.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

¶16 NETTESHEIM, P.J. (*concurring*). I read the majority opinion to say that under the "strict compliance" rule of ***State v. Austin***, 171 Wis. 2d 251, 257-58, 490 N.W.2d 780 (Ct. App. 1992), a formal written agreement pursuant to WIS. STAT. § 971.20(11) is necessary before a case may be returned to the substituted judge. I do not share that broad interpretation of ***Austin***. I see no reason why, in the appropriate case, the requirements of § 971.20(11) could not be satisfied with sufficient on-the-record proceedings with all of the necessary principals under the statute.

¶17 In ***Austin***, the State argued that Austin had impliedly waived the written agreement requirement of WIS. STAT. § 971.20(11) by failing to object when the case was returned to the substituted judge. ***Austin***, 171 Wis. 2d. at 257. The court of appeals held that implied waiver did not apply under § 971.20(11). But in ***Austin***, the court was dealing with a barren record. The court did not indicate whether a record demonstrating the functional equivalent of the written agreement required by the statute would suffice.

¶18 If a record demonstrated that all of the necessary parties consented to the return of the case to the substituted judge, such would constitute the functional equivalent of the written agreement otherwise required under WIS. STAT. § 971.20(11). Had the record of the proceedings in ***Austin*** demonstrated the parties' unequivocal and clear agreement to return the case to the substituted judge, I daresay the result would have been different. Instead, the record was barren of any such agreement.

¶19 Therefore, the problem in this case does not lie so much in the fact that a written agreement was not filed pursuant to the requirements of WIS. STAT. § 971.20(11). Rather, the problem lies in the fact that the records of the proceedings before Judge Gibbs and at the later plea hearing before Judge Carlson do not sufficiently demonstrate that the parties were consciously invoking the procedure contemplated by § 971.20(11). Had the parties expressly indicated to the respective judges that they were purposefully invoking the procedures of the statute and desired to make a record of the agreement contemplated by the statute, I would hold that such would suffice as the substantial equivalent of the "written agreement" required by the statute. Under those circumstances, I would affirm.

¶20 In many instances an on-the-record proceeding could be a more solid demonstration of the parties' agreement than the written agreement contemplated by WIS. STAT. § 971.20(11). Such proceedings would allow each judge to explore and confirm the parties' consent to and understanding of the agreement. In addition, although the statute does not require a represented defendant to sign the written agreement, such on-the-record proceedings would permit the respective judges to establish by personal colloquy that the defendant understands and consents to the return of the case to the substituted judge. That would largely preclude later challenges to the agreement.

¶21 Here, the records of the proceedings before Judge Gibbs and Judge Carlson come close, but not close enough, to establishing the functional equivalent of the written agreement required by WIS. STAT. § 971.20(11). Therefore, on this different basis, I concur with the majority opinion.