**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 3, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-2662-CR** **Cir. Ct. No. 02-CT-41**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PETER J. DAVIES,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

¶1 DEININGER, J.[1] Peter Davies appeals an order denying his request for substitution of judge. He claims the trial court erred in concluding that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

request was untimely under WIS. STAT. § 971.20(4). We agree and reverse the circuit court's order and remand for further proceedings.

## BACKGROUND[2]

¶2 The following provisions of WIS. STAT. § 971.20 are relevant to this appeal:

> **(1)** DEFINITION. In this section, "action" means all proceedings before a court from the filing of a complaint to final disposition at the trial level.
>
> **(2)** ONE SUBSTITUTION. In any criminal action, the defendant has a right to only one substitution of a judge, except [following an appeal]. The right of substitution shall be exercised as provided in this section.
>
> ….
>
> **(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.

¶3 A Village of Stoddard police officer issued a traffic citation to Davies on April 27, 2002, charging him with first-offense operating a motor vehicle under the influence of an intoxicant (OMVWI), a forfeiture offense under the village's traffic ordinance. The citation, and a "Notice of Intent to Revoke Operating Privilege" for Davies's refusal to submit to chemical testing for alcohol

[2] This appeal shares a record with Appeal No. 02-1899, where Davies challenged the court's entry of an order under WIS. STAT. § 343.305 revoking his motor vehicle operating privilege for refusing to submit to a chemical test for alcohol concentration. *See* ***State v. Davies***, No. 02-1899, unpublished slip op. (WI App Feb. 13, 2003). We rely on the record in that appeal and this one, on the trial court's "Findings of Fact," and on matters reported on the CCAP Wisconsin Circuit Court Access website (http://wcca.wicourts.gov) for background information relevant to this appeal. It does not appear that the happening or sequence of the events material to this appeal are in dispute.

concentration were filed with the Vernon County Circuit Court on May 9, 2002. The case was assigned case number 2002-TR-626, captioned "Village of Stoddard vs. Peter J. Davies." The citation carried a return date of June 10, 2002, for Davies to appear in circuit court and enter a plea.

¶4 Davies's counsel filed the following documents on May 10, 2002: Notice of Motion, Motion for Discovery, and Demand for Hearing on Refusal. The caption of each document bears the citation number in type, and the Notice and the Demand bear the hand-written case number "02-TR-626." On June 6, Davies filed a Consent to Act, authorizing his counsel to appear and act on his behalf. The Consent also carries the hand-written case number "02-TR-626."

¶5 Prior to the June 10th return date, Davies's counsel contacted the clerk of circuit court's office and requested to appear by phone. The clerk advised him that, pursuant to local practice, no appearance by either Davies or counsel would be required, that a plea of not guilty would be entered, and that counsel would be notified of the next scheduled court date. When the case was called on June 10th, a not guilty plea was entered on Davies's behalf.

¶6 Davies's counsel filed the following documents on June 12th: Demand for Jury Trial, Notice of Motions, Motion to Discover Videotape, and Motion for Extension of Time to File Motions to Suppress. These documents bear only the citation number. The next day, counsel filed a Notice of Motion, Motion to Dismiss Refusal Proceeding, and a Brief in Support of Motion to Dismiss Refusal Proceeding, all of which bear the handwritten case number "02-TR-626."

¶7 Court appearances were scheduled for July 8th (status conference/refusal hearing) and July 15th (jury selection), and counsel was so

notified. Counsel wrote the clerk to request that these dates be "set over" due to previous commitments of counsel in other counties for the dates in question. The court's judicial assistant contacted the office of Davies's counsel to attempt to find an acceptable date and was told that counsel could not be available in Vernon County until November. So lengthy a continuance was apparently unacceptable to both the prosecutor and the court, and this fact was communicated to counsel's office. Counsel faxed the court a letter on July 3rd in which he noted that he had been informed that his earlier request to reschedule the July 8 and 15 proceedings had been denied, and he renewed the request.

¶8 Meanwhile, on June 25th, the Vernon County Assistant District Attorney filed a criminal complaint charging Davies with OMVWI, second offense, for the April 27 incident in Stoddard.[3] The clerk of circuit court assigned a new case number ("02-CT-41") to the complaint but maintained all documents previously filed in case number 02-TR-626 as part of the file for the newly designated criminal case.

¶9 At the heart of the dispute in this appeal is the question of whether, for purposes of applying statutory deadlines for requesting judicial substitution, the State's criminal OMVWI prosecution is a new and separate action, or is simply a continuation of the Village of Stoddard's forfeiture action involving the same facts. We therefore describe in more detail what court records reflect regarding the issue. A document in the record entitled "Criminal Court Record" for "Case Number 2002CT000041" (a report apparently generated via the Consolidated

[3] The complaint recites that the date of the offense was "February 27, 2002," but this is apparently a clerical error.

Court Automation Programs (CCAP)), begins with a "filing date" of May 9, 2002. The report includes entries for all of the documents we have described that were filed in case number 02-TR-626, including the citation and the various documents filed by Davies and his counsel. An entry for 06-25-2002 reads "Renumber from 02TR000626," and another of the same date, "Criminal Complaint filed."

¶10 The CCAP Wisconsin Circuit Court Access website (http://wcca.wicourts.gov), however, provides somewhat contradictory information regarding the disposition of case number 02-TR-626. The website record for the Village of Stoddard forfeiture action shows that a citation was filed on May 9, 2002, and the record contains the following entry: "On 06-25-2002 there was a finding of: Action Dismiss/new file CT." The website record for case number 02-CT-41, captioned "State of Wisconsin vs. Peter J. Davies," also shows a "filing date" of "05-09-2002" and an initial charge of "Operating while Intoxicated" as a forfeiture offense, to which a not guilty plea was entered on "06-10-2002." The electronic record for the criminal case then states that the charge was "Amended on 07-01-2002 to: … Operating while Intoxicated (2nd)," a misdemeanor, for which a not guilty plea was also purportedly entered on "06-10-2002," some three weeks before the charge was "amended."

¶11 The inconsistencies in the CCAP entries for the two case numbers are explained by the trial court in its decision and order denying Davies's substitution request as follows:

> Based upon further investigation by the state a criminal complaint was filed. This is not an uncommon occurrence in OWI cases where arresting officers must make quick decisions on limited information. In these situations, although the original citation is dismissed upon the filing of the complaint, the clerk treats the case as one continuous action.

¶12 The next event of significance to this appeal is the filing by Davies's counsel on July 16, 2002, of a request for substitution of judge.[4] The request names the State as plaintiff in the caption, bears the typed case number "02 CT 41," and cites WIS. STAT. § 971.20 as authorization. In its order denying the request, the trial court concluded that "the citation filed on May 9 was the complaint referred to in § 971.20(1); that the defendant made various motions to the court after May 9 and, therefore, is not entitle[d] to substitution under § 971.20(4)." Davies appeals the order denying his request for substitution.[5]

## ANALYSIS

¶13 Resolution of this appeal requires us to interpret and apply WIS. STAT. § 971.20 to the facts at hand. The appeal thus presents a question of law we decide de novo. *See* ***State v. Sweat***, 208 Wis. 2d 409, 414-15, 561 N.W.2d 695 (1997).

¶14 Had this case remained a traffic forfeiture action, Davies's right to request a substitution would have expired seven days after the "initial appearance" on the citation:

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[4] On July 8, 2002, upon the failure of Davies or his counsel to appear for the refusal hearing and status conference, the trial court ordered Davies's operating privilege revoked and directed that a bench warrant be issued. Neither of these actions are at issue in this appeal. See footnote 2.

[5] We granted Davies's petition for leave under WIS. STAT. § 808.03(2) to appeal the nonfinal order denying his substitution request. *See* ***State ex rel. Mace v. Green Lake County Circuit Court***, 193 Wis. 2d 208, 211 n.1, 532 N.W.2d 720 (1995) (Review of a "trial court's ruling on the form and timeliness of a request for substitution of a judge" may be by petition for supervisory writ or by petition for leave to appeal under § 808.03(2)); ***State v. Damaske***, 212 Wis. 2d 169, 184-86, 567 N.W.2d 905 (Ct. App. 1997) (Trial court's ruling that a substitution request is untimely may also be challenged by seeking review "'by the chief judge of the administrative district.'") (citation omitted).

> In traffic regulation and nonmoving traffic violation cases a person charged with a violation may file a written request for a substitution of a different judge for the judge originally assigned to the trial of that case. The written request shall be filed not later than 7 days after the initial appearance in person or by an attorney.

WIS. STAT. § 345.315(1). The "initial appearance" in case no. 02-TR-626 occurred on June 10th, when per agreement with Davies's counsel, a not guilty plea was entered on Davies's behalf and the case was scheduled for further proceedings. Had the case remained a first-offense prosecution under the village ordinance, Davies's right to request substitution would thus have expired on June 17th.

¶15 The case did not remain a forfeiture action, however. Davies contends that the filing of the criminal complaint on June 25th was the commencement of the relevant "action" for purposes of applying WIS. STAT. § 971.20. *See* § 971.20(1) ("In this section, 'action' means all proceedings before a court from the filing of a complaint to final disposition at the trial level."). Davies argues that case number 02-TR-626 was dismissed when case number 02-CT-41 commenced, and in his view, the fact that he entered a not guilty plea and filed several motions in the earlier forfeiture action is of no relevance in determining whether his substitution request in the criminal action was timely.

¶16 The State responds that the citation filed on May 9, 2002, was "the equivalent of the filing of a complaint," thereby commencing what ultimately became a criminal action. Because Davies filed several motions between May 10 and June 13, the State contends that he forfeited his right to thereafter request a substitution of the assigned judge under WIS. STAT. § 971.20(4), which requires the request to be made "before making any motions to the trial court." According to the State (and the trial court), what happened on June 25th was merely an

amendment of the original charge and a case renumbering in one continuous action. In the State's view, these events cannot serve to revive Davies's forfeited right to substitute the judge assigned to his case because he and his counsel knew from the time the OMVWI citation was first filed that Judge Rosborough would hear the case, and that fact did not change when the State filed its complaint converting the case to a criminal prosecution.

¶17 The State's position finds some support in the case law. The supreme court has explained that, "recognizing the vagaries of practice and procedure … [WIS. STAT. §] 971.20 must be applied in a reasonable manner to obtain its objective and to give effect to the predominant intent of the legislature." ***Clark v. State***, 92 Wis. 2d 617, 627, 286 N.W.2d 344 (1979). The "key to the statutory right of substitution [is] the defendant's ability to exercise his right of substitution intelligently," which means that a defendant must be given "a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case." ***Id***. at 627-28; *see also* ***State ex rel. Tinti v. Waukesha County Circuit Court***, 159 Wis. 2d 783, 789, 464 N.W.2d 853 (Ct. App. 1990). Once a defendant learns the identity of the assigned judge, however, he or she must act to obtain a substitution before acceding "to the trial jurisdiction of the assigned judge by consenting to arraignment or by asking that judge for relief by submitting motions." ***State ex rel. Warrington v. Shawano County Circuit Court***, 100 Wis. 2d 726, 731, 303 N.W.2d 590 (1981); ***Tinti***, 159 Wis. 2d at 789.

¶18 Because Davies knew that Judge Rosborough would oversee the trial and disposition of the OMVWI charge, a fact which did not change upon the filing of the criminal complaint, the policy underlying WIS. STAT. § 971.20, as explained above, would arguably preclude Davies from requesting a different judge after he

filed any motions before Judge Rosborough. In a case bearing some procedural similarities to this one, we concluded that the right of a defendant in a criminal traffic case to request substitution did not expire at his "arraignment" only because he did *not* know at that time what judge would be assigned to the trial of the case. ***State ex rel. Tessmer v. Circuit Court Branch III***, 123 Wis. 2d 439, 443-44, 367 N.W.2d 235 (Ct. App. 1985). Had the defendant in ***Tessmer*** known the identity of the judge assigned to his case at the time he entered his not guilty plea, however, his right to request substitution would have expired on or "before the return date established by the citation." ***Id***. at 442.

¶19 The defendant in ***Tessmer*** had been issued a "citation" which "instructed him to appear" in circuit court at a specified time and date, and he did so. ***Id***. at 440-41. On the return date, he "was given a criminal complaint and entered a not guilty plea," and the case was set for a pretrial at a later date. ***Id***. at 441. We concluded that the return date proceeding was "tantamount to an arraignment" inasmuch as "[a] plea was entered and the case set over for further trial proceedings." ***Id***. at 442. Our statement of the case in ***Tessmer*** does not say whether the citation originally issued to the defendant was assigned a case number different than that of the criminal traffic prosecution which ensued, or whether the defendant made any motions prior to the return date. Those events would have been of little consequence in ***Tessmer***, however, because the State filed a criminal complaint on the return date, and the court conducted an immediate arraignment on the complaint. As we have explained, had Tessmer known the identity of the assigned judge at that time, his right to request substitution would have expired then and there. ***Id***.

¶20 Here, however, the criminal complaint was not filed until two weeks after the June 10th return date on Davies's citation. Although the CCAP website

record for case number 02-CT-41 indicates that a not guilty plea was entered in the criminal action on June 10th, the court could not have conducted an "arraignment" on the criminal complaint on that date. *See* ***Tinti***, 159 Wis. 2d at 788 ("a misdemeanor arraignment includes: … a reading of the complaint unless the defendant waives the reading …." (citing WIS. STAT. § 971.05)). Inasmuch as no "misdemeanor arraignment" was conducted prior to Davies's request for substitution, his July 16th request was untimely only if he had made "motions to the trial court" before that date. WIS. STAT. § 971.20(4).

¶21 Accordingly, we next examine the documents Davies filed to determine whether any of them were "motions to the trial court." If none were, their filing in either case number 02-TR-626 or 02-CT-41 becomes irrelevant. We conclude that Davies's "Demand for Jury Trial" cannot be deemed a "motion to the trial court" in the criminal case because such a demand is not necessary in a criminal case, the right to a jury trial in misdemeanor prosecutions being constitutionally guaranteed. *See* WIS. CONST. art. I, § 7; ***State v. Hansford***, 219 Wis. 2d 226, 240-41, 580 N.W.2d 171 (1998).

¶22 Neither are the various documents relating to the refusal proceedings "motions to the trial court" in the prosecution action. A refusal hearing is a separate "special proceeding." *See* ***State v. Schoepp***, 204 Wis. 2d 266, 270, 554 N.W.2d 236 (Ct. App. 1996). Moreover, a request for a refusal hearing must be filed within ten days of the issuance of the Notice of Intent to Revoke. *See* WIS. STAT. § 343.305(9). The request must therefore often be filed before an action regarding the related OMVWI offense has begun, and almost certainly before an initial appearance on the OMVWI citation or complaint will have occurred. Depriving a defendant the right to file a substitution request in an OMVWI prosecution because he or she has requested a refusal hearing would arguably

contravene the policy underlying the substitution statute. *See* ***Tessmer***, 123 Wis. 2d at 443 ("A requirement that the defendant file a substitution request prior to any appearance in court is contrary to the legislative goal of affording a defendant an opportunity to intelligently exercise the right of substitution.").

¶23 We are thus left with Davies's "Motion for Discovery" filed on May 10th, and his motions "to Discover Videotape" and "for Extension of Time to File Motions to Suppress," both filed on June 12th. The first motion requests an order permitting Davies to inspect and test "all devices used by the plaintiff to determine whether a violation has been committed." We question the germaneness of this motion given that Davies refused to submit to chemical testing for alcohol concentration. The motion nonetheless is one directed toward the preparation of a defense against the OMVWI charge. So, too, are Davies's motion relating to videotape evidence, which recites that any such tape "is material to the guilt or innocence of the defendant and the issues at the trial in this action," and his motion requesting an extended deadline for filing suppression motions.

¶24 We conclude that these three motions, all relating to defending the OMVWI charge at or before trial, and all filed prior to Davies's substitution request, are therefore "motions to the trial court" which would render his request untimely *if* Davies "made" them in case number 02-CT-41, within the meaning of WIS. STAT. § 971.20(4). That is the dispositive question to which we now turn.

¶25 We have already noted that the procedural facts of this case are similar but not identical to those in ***Tessmer***, where a criminal action was plainly commenced for purposes of the substitution statute with the filing of a criminal complaint on the citation return date. *See* WIS. STAT. § 971.20(1). Here, because the return date had passed and further proceedings were scheduled in case number

02-TR-626 before a criminal complaint was filed, it is more difficult to discern a clear separation in the record between the initial forfeiture action and the subsequent criminal prosecution. On other facts, a temporal distinction between the two actions might be more apparent.

¶26 Say, for example, that the Village of Stoddard had dismissed its citation at or before the return date and referred the matter to the district attorney for criminal prosecution. If the State had then filed its criminal complaint two weeks later and summoned Davies to appear and plead to the complaint, the State would have considerably more difficulty asserting that the criminal prosecution was the "same action" as the dismissed forfeiture action. If the State attempted to make that claim, we would be hard pressed to conclude that any motions previously filed in the dismissed forfeiture action were also "made" in the criminal action, even if the clerk of court were to transfer the motion documents from the file of the dismissed case to the file for the new one.

¶27 The facts before us lie somewhere between those in ***Tessmer*** and the hypothetical posed in the preceding paragraph. The trial court found that, pursuant to the clerk's customary practice in Vernon County, the Village of Stoddard's forfeiture action and the State's criminal prosecution were treated as "one continuous action." We conclude, however, that the availability or not of a defendant's right to request substitution of a judge in a criminal case cannot turn on the administrative practices of the clerk of circuit court. That is, the motions in question were either "made" in the criminal action for purposes of WIS. STAT. § 971.20(4), or they were not, regardless of whether the clerk chose to treat the criminal action and the forfeiture action as "one continuous action" or as two separate ones.

¶28 As with other applications of WIS. STAT. § 971.20 to specific factual and procedural circumstances, the "key" to interpreting "the statutory right of substitution [is] the defendant's ability to exercise his right of substitution intelligently." ***Clark***, 92 Wis. 2d at 627-28. Here, as we have discussed, the fact that Judge Rosborough was the judge assigned to hear the OMVWI prosecution did not change when the State filed its criminal complaint. Several other things did change, however.

¶29 The possible penalties that the court could impose if Davies were found guilty increased dramatically.[6] Other things changed, too, such as the identity of the plaintiff (although apparently not of the prosecutor), the plaintiff's burden of proof at trial, and certain other procedural matters, the most significant being Davies's ability to avoid testifying at trial.[7] These fundamental differences in the nature of the action might well have altered how Davies or his counsel viewed the advisability of proceeding to trial. For example, Davies may have initially been inclined to plead no contest and bear the penalties for first-offense OMVWI rather than the costs and risks of going to trial. The combination of harsher second-offense penalties, a higher burden of proof, and the ability to avoid

[6] Potential penalties for a first-offense OMVWI conviction included a forfeiture of $150 to $300 and a six-to-nine month revocation of Davies's drivers license, with immediate eligibility for an occupational license; for a second-offense conviction, Davies faced a fine of $350 to $1100, a sentence of five days to six months in jail, and a license revocation of twelve to eighteen months, with no occupational license for at least sixty days. *See* WIS. STAT. §§ 343.30(1q)(b) and 346.65(2) (1999-2000).

[7] The plaintiff in a traffic forfeiture prosecution need not prove an offense beyond a reasonable doubt but only by evidence "that is clear, satisfactory and convincing." WIS. STAT. § 345.45 In a criminal prosecution, Davies has the right not to testify. U.S. CONST. amend. V; WIS. CONST. art. 1, § 8. In a forfeiture action, however, which is a civil proceeding, a defendant may be called adversely. *See* ***State v. R.B.***, 108 Wis. 2d 494, 498, 322 N.W.2d 502 (Ct. App. 1982).

testifying, however, might have made trial a more attractive option in the criminal prosecution, especially given that the State lacked admissible chemical test evidence of Davies's alcohol concentration.

¶30 For these and perhaps other reasons, the identity of the trial judge could well take on much larger significance when the forfeiture action became a criminal prosecution. We conclude that Davies could not intelligently exercise his statutory right to substitute the assigned judge until he knew not only the judge's identity but also that he was facing a criminal prosecution for his violation. Accordingly, we conclude that the motions filed in case number 02-TR-626 which predated the filing of the criminal complaint were not "motions [made] to the trial court" in the criminal action, case number 02-CT-41, within the meaning of WIS. STAT. § 971.20(4).[8]

¶31 Finally, we note in closing that the trial court expressed frustration with what, in the context of the present case, it deemed delaying tactics on the part of Davies or his counsel.[9] We share the court's concern that courts should

[8] We emphasize that our conclusion applies only to the present facts, where the fundamental nature and procedural aspects of two, arguably separate actions differ markedly. We do not wish to imply that a defendant's right to request substitution in a criminal case, once expired, may be revived simply because the stakes of the prosecution are raised by amendments to the complaint which increase the number or severity of the charges. Once a criminal action is commenced with the filing of a complaint, a defendant enjoys but one opportunity to obtain a substitution, and the request must be filed before any motions are made and before arraignment. *See* WIS. STAT. § 971.20(1), (2) and (4).

[9] The court, among other things, stated: "Judges struggle daily with lawyers and litigants who seek to gain control of court calendars. Delay is the bane of a system, which has as its goal to obtain just results."

endeavor to deter parties and their counsel from employing procedural devices simply for purposes of delay.[10] In this regard, we acknowledged in ***Tinti*** that

> the substitution statute can be invoked for reasons not related to the goal of preserving fair trial or the appearance of fair trial, ***State v. Holmes***, 106 Wis. 2d 31, 59, 315 N.W.2d 703, 716 (1982), with resulting inefficiency and inconvenience. ***Id***. at 62, 67, 315 N.W.2d at 717-18, 720. Nonetheless, the supreme court has declared the statute constitutional as a proper exercise of the legislative function and not violative of the separation of powers doctrine. ***Id***. at 74, 315 N.W.2d at 724. As the supreme court has noted, it is for the legislature to balance the fairness goals of the substitution statute against the statute's adverse effects upon the courts. *See* ***id***. Any correction in this balance is also for the legislature.

***Tinti***, 159 Wis. 2d at 791-92.

¶32 Thus, although we agree that it would be inappropriate for many reasons for this court to expand the right of judicial substitution beyond what the legislature has granted, neither may we contract the statutory right by judicial interpretation to something less than the legislature intended. Rather, we are to apply WIS. STAT. § 971.20 "in a reasonable manner to obtain its objective and to give effect to the predominant intent of the legislature," regardless of such "vagaries of practice and procedure" as the manner in which a clerk of court chooses to administer a court's case files. ***Clark***, 92 Wis. 2d at 627.

## CONCLUSION

¶33 For the reasons discussed above, we reverse the appealed order. Because Davies made a timely request for substitution of judge, the clerk of circuit

[10] *See* SCR 20:3.2 (2002) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

court shall proceed on remand as directed under WIS. STAT. § 971.20(8) to request the assignment of another judge to hear case number 02-CT-41.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.