

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,)
)
 Plaintiff,)
)
 v.) Case No. 05-CF-381
)
 STEVEN A. AVERY,)
)
 Defendant.)

DEFENDANT'S MOTION FOR SUBSTITUTION OF JUDGE

Defendant, Steven Avery ("Mr. Avery"), by his undersigned attorneys, respectfully moves for a substitution of judge pursuant to Wis. Stat. § 801.58(7). In support thereof, Mr. Avery states as follows:

1. On October 3, 2017, the Honorable Angela Sutkiewicz ("Judge Sutkiewicz") dismissed Mr. Avery's motion for post-conviction relief.
2. On November 17, 2017, Mr. Avery filed a notice of appeal from Judge Sutkiewicz's October 3, 2017, order.
3. On November 28, 2017, Judge Sutkiewicz denied Mr. Avery's motion for reconsideration and supplements thereto.
4. On November 30, 2017, Mr. Avery filed a notice of appeal from Judge Sutkiewicz's November 28, 2017, order.
5. On May 18, 2018, Mr. Avery filed with the court of appeals a motion to supplement the record on appeal with a CD disclosed by the State to Mr. Avery during the pendency of the appeal.

6. In the motion to supplement, Mr. Avery alleged that a *Brady* violation occurred when the State failed to disclose a CD which contained images and an analysis of the images and information obtained after the Dassey's computer was seized and analyzed. Mr. Avery contends that the suppressed evidence on the CD is exculpatory and/or impeaching and Mr. Avery was prejudiced because the evidence is material to his guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963).

7. On May 25, 2018, the State filed a response in opposition to the motion to supplement. On May 29, 2018, Mr. Avery filed a reply in support of the motion.

8. On June 7, 2018, the court of appeals entered an order denying the motion to supplement and remanding the case to the circuit court for further proceedings. In pertinent part, the order states as follows:

Based on the assertion that Avery recently received previously withheld discovery or other new information, we retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in the circuit court. Avery shall file any supplemental postconviction motion within thirty days of the date of this order. The circuit court shall hold proceedings on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion within sixty days after the motion is filed.

See copy of order, attached as Exhibit A.

9. The rules of civil procedure apply to Mr. Avery's post-conviction proceedings. *See* Wis. Stat. § 974.06(6) ("Proceedings under this section shall be considered civil in nature[.]"); Wis. Stat. § 972.11(1) ("[T]he rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.").

10. The rule of civil procedure governing the substitution of judge, Wis. Stat. § 801.58, provides as follows:

(1) Any party to a civil action or proceeding may file a written request, signed personally or by his attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case.

* * *

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

See Wis. Stat. § 801.58, attached as Exhibit B.

11. The remittitur was filed in this Court on June 11, 2018. This motion is filed within 20 days of the date the remittitur was filed. Mr. Avery's motion is therefore timely.

12. Mr. Avery's motion is also proper, as the statute provides that he has an unqualified right to substitution of judge under these circumstances. *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, 233 Wis.2d 428, 608 N.W.2d 679.

13. In *Findorff*, the trial court ruled against the defendant in a breach of contract action and awarded the plaintiff special damages. On appeal, the court of appeals held that the trial court erred where it failed to make factual findings to entitle the plaintiff to recover future lost profits. The court remanded the case with

a directive for the circuit court to make detailed factual findings and determine whether the facts supported an award of consequential damages. *Id.* at ¶¶ 4-6.

14. On remand, the defendant, Findorff, moved for a substitution of judge under Wis. Stat. § 801.58(7). The chief judge denied the substitution. In doing so, the chief judge commented that reassigning the case would be basically the same as ordering a completely new trial. He concluded that the right of substitution did not attach because the court of appeals gave directives that were “very specific” and did not call for a new trial. *Id.* at ¶ 7.

15. Findorff filed a petition for supervisory relief with the court of appeals. The court of appeals denied the motion. In doing so, it held that the right to substitution exists when the case is remanded for a new trial or for proceedings other than specific action. The court concluded that the remand order required specific action. It reached that conclusion because no new evidence or facts needed to be elicited for the trial court to comply with the mandate. *Id.* at ¶¶ 8-10.

16. On further appeal, the Wisconsin Supreme Court noted that following remand and remittitur, a circuit court may conduct three types of proceedings: 1) a proceeding in which a circuit court takes specific action as ordered by the higher court; 2) a proceeding in which a circuit court conducts a new trial; or 3) any further proceedings other than those mentioned above. *Id.* at ¶ 14 (citing Wis. Stat. § 808.08(1)-(3)). If the mandate calls for “further proceedings” as contemplated by Wis. Stat. § 808.08(3), the parties have a right to substitution upon request. If the mandate calls for “specific action,” then there is no right of substitution. *Id.* at ¶ 15.

17. The Wisconsin Supreme Court narrowly defined “specific action” as a purely ministerial duty requiring no exercise of discretion on the part of the circuit court. Conversely, the Court broadly defined “further proceedings” to include any situation in which the circuit court may exercise its discretion in discharging its duties on remand. The Court based its ruling in part on the wide purview of the substitution statute, which suggests it should be liberally construed to permit substitutions, as well as Wisconsin’s “long heritage of upholding the right to substitution.” *Id.* at ¶¶ 20-24.

18. The Wisconsin Supreme Court concluded that the mandate at issue directed the circuit court to undertake “further proceedings” to which the right of substitution attached. Namely, the order required the circuit court to make “factual findings and determine whether the facts support an award.” The Court held that the directive required the circuit court to make an evaluation which required the exercise of discretion. Thus, Findorff’s motion for substitution was improperly denied. *Id.* at ¶¶ 26-27.

19. In the instant case, the court of appeals directive on remand requires the circuit court to evaluate Mr. Avery’s supplemental postconviction motion and “enter written findings and conclusions[.]” The order contemplates that the circuit court may grant or deny Mr. Avery’s supplemental petition.¹ In short, the order grants the circuit court unfettered discretion to resolve the merits of Mr. Avery’s

¹ The court of appeals order states, “In the event Avery remains aggrieved, the circuit court clerk shall re-transmit the record, including any post-remand papers, according to the procedures described below, and the appeal will continue. ... If Avery is afforded relief pursuant to his supplemental postconviction motion, he may seek dismissal of the pending appeal.”

supplemental postconviction claims which may grant him the relief he is seeking and result in the dismissal of the pending appeal. Because the appellate court's order requires the circuit court to exercise its discretion in discharging its duties on remand, the mandate requires "further proceedings" to which the unqualified right of substitution attaches.

20. Moreover, for the convenience of the judiciary, the parties, and witnesses, Mr. Avery respectfully requests that his case be reassigned to a judge in Manitowoc County. The record, evidence, and many of the witnesses in this matter are located in Manitowoc. All pleadings are filed with the clerk of the circuit court of Manitowoc. In short, at this juncture holding further proceedings in Manitowoc before a Manitowoc judge would be the most efficient use of judicial resources. At this juncture in Mr. Avery's case all of the prior reasons for holding the legal proceedings outside of Manitowoc no longer exist.

Wherefore, for the reasons stated herein, Mr. Avery respectfully requests a substitution of judge in accordance with Wis. Stat. § 801.58.

Dated: June 14, 2018

Respectfully submitted,



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DISTRICT II



FILED

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MANITOWOC COUNTY, WI

June 7, 2018

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

2017AP2288

State of Wisconsin v. Steven A. Avery (L.C. # 2005CF381)

Before Reilly, P.J.

The appellant, Steven A. Avery, by counsel, moves to supplement the record with a compact disc "disclosed to defendant for the first time on April 17, 2018." Avery alleges that the CD contains exculpatory, material evidence and that State's failure to disclose the CD earlier violates his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The State objects because the CD was not part of the record before the circuit court when it denied Avery's WIS. STAT. § 974.06 postconviction motion and his motions for reconsideration. Avery

has filed a reply asserting that supplementation is appropriate because although the CD itself was not presented to the circuit court, the facts surrounding the “suppression of the contents of the undisclosed CD to trial defense counsel” are contained in the record through Avery’s prior postconviction motions and the attachments thereto. Avery contends that we should add the CD to the record “because the circuit court had all of the *Brady* issues before it” and “[t]he State should not be rewarded for having suppressed the CD until after the appellate record was completed.”

Avery’s reply misses the point, which is that we are not a fact-finding court and cannot consider items not presented to the circuit court. Based on the assertion that Avery recently received previously withheld discovery or other new information, we retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in the circuit court. Avery shall file any supplemental postconviction motion within thirty days of the date of this order. The circuit court shall hold proceedings on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion within sixty days after the motion is filed. In the event Avery remains aggrieved, the circuit court clerk shall re-transmit the record, including any post-remand papers, according to the procedures described below, and the appeal will continue. In addition to any pre-existing issues, the parties’ appellate briefs shall address any new issues arising from the circuit court’s post-remand order deciding Avery’s supplemental postconviction motion. If Avery is afforded relief pursuant to his supplemental postconviction motion, he may seek dismissal of the pending appeal. If the appeal is dismissed but the State is aggrieved, it may file a notice of appeal from the circuit court’s order deciding any supplemental postconviction motion entered pursuant to this remand. Therefore,

IT IS ORDERED that the motion to supplement the record is denied.

IT IS FURTHER ORDERED that this appeal is remanded forthwith to the circuit court to permit Steven A. Avery to pursue a supplemental postconviction motion in connection with Avery's receipt of previously withheld discovery or other new information.

IT IS FURTHER ORDERED that any supplemental postconviction motion shall be filed in the circuit court within thirty days.

IT IS FURTHER ORDERED that the circuit court shall conduct any necessary proceedings and enter an order containing its findings and conclusions within sixty days after the supplemental postconviction motion is filed.

IT IS FURTHER ORDERED that if Avery intends to order a transcript of any post-remand hearing, he shall do so within ten days after the circuit court enters its order deciding the supplemental postconviction motion. Any such transcript shall be filed and served within twenty days after its request. Avery shall provide the court reporter with a copy of this order.

IT IS FURTHER ORDERED that Avery shall file a statement on transcript within fifteen days after the circuit court enters its post-remand order deciding the supplemental postconviction motion. The statement on transcript shall reflect either that a post-remand transcript has been ordered or that such a transcript is not necessary for this appeal.

IT IS FURTHER ORDERED that the circuit court clerk shall re-transmit the record to this court within twenty days after the later of the entry of the circuit court order resolving the supplemental postconviction motion or the filing of any post-remand hearing transcript, if ordered. The record shall include any papers filed pursuant to this remand.

IT IS FURTHER ORDERED that the appellant shall file an appellant's opening brief presenting all grounds for relief within forty days after the filing of the record.

Sheila T. Reiff
Clerk of Court of Appeals



West's Wisconsin Statutes Annotated
Civil Procedure (Ch. 799 to 847)
Chapter 801. Civil Procedure--Commencement of Action and Venue (Refs & Annos)

W.S.A. 801.58

801.58. Substitution of judge

Effective: April 18, 2014
Currentness

(1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge under s. 751.03. If the judge named in the substitution request finds that the request was not timely and in proper form, that determination may be reviewed by the chief judge of the judicial administrative district, or by the chief judge of an adjoining judicial administrative district if the judge named in the request is the chief judge, if the party who made the substitution request files a written request for review with the clerk no later than 10 days after the determination by the judge named in the request. If no determination is made by the judge named in the request within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district or to the chief judge of an adjoining judicial administrative district, if the judge named in the request is the chief judge, for determination of whether the request was made timely and in proper form and reassignment as necessary. The newly assigned judge shall proceed under s. 802.10(1).

(2m) If, under sub. (2), the judge determines that the request for substitution was made timely and in proper form, any ex parte order granted by the original judge remains in effect according to the terms, except that a temporary restraining order issued under s. 813.12(3), 813.122(4), 813.123(4), or 813.125(3) by the original judge is extended until the newly assigned judge holds a hearing on the issuance of an injunction. The newly assigned judge shall hear any subsequent motion to modify or vacate any ex parte order granted by the original judge.

(3) Except as provided in sub. (7), no party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

(4) Upon the filing of an agreement signed by all parties to a civil action or proceeding, by the original judge for which a substitution of a new judge has been made, and by the new judge, the civil action or proceeding and pertinent records shall be transferred back to the original judge.

(5) In addition to other substitution of judge procedures, in probate matters a party may file a written request specifically stating the issue in a probate proceeding for which a request for substitution of a new judge has been made. The judge shall thereupon be substituted in relation to that issue but after resolution of the issue shall continue with the administration of the estate. If a person wishes to file a written request for substitution of a new judge for the entire proceeding, subs. (1) to (4) shall apply.

(6)(a) In probate matters ss. 801.59 to 801.62 apply, except that upon the substitution of any judge, the case shall be referred to the register in probate, who shall request assignment of another judge under s. 751.03 to attend and hold court in such matter.

(b) Ex parte orders, letters, bonds, petitions and affidavits may be presented to the assigned judge, by mail or in person, for signing or approving, wherever the judge may be holding court, who shall execute or approve the same and forthwith transmit the same to the attorney who presented it, for filing with the circuit court of the county where the records and files of the matter are kept.

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

Credits

<<For credits, see Historical Note field.>>

Editors' Notes

JUDICIAL COUNCIL NOTES--1981

Subsection (2) has been revised to allow the clerk to refer the substitution request to the chief judge of the judicial administrative district when the judge whose substitution has been requested fails to determine within 7 days whether the request is timely made and in proper form.

Subsection (7) has been amended to clarify that the 20-day time period for filing a substitution request after an appellate remand commences upon the filing of the remittitur in the trial court. *Rohl v. State*, 97 Wis.2d 514 (1980).

JUDICIAL COUNCIL NOTES--1978

This subsection [subsec. (1)] is amended to give a plaintiff 60 days from the time the summons and complaint are filed or a defendant or any added party 60 days after service of a summons and complaint upon them to request a substitution of a new judge, provided no preliminary contested matters have been argued by the

requester. The previous time periods for requesting a substitution of judge (i.e., 10 days after the date of notice for a scheduling conference or 10 days after service of a standard scheduling order) are repealed as the use of such a conference or order is no longer mandatory under s. 802.10.

JUDICIAL COUNCIL NOTES--1977

Section 801.58 of the statutes has been changed in a number of significant ways. The statute states that a substitution of judge request in a civil action or proceeding is timely only if made before the hearing of a preliminary contested matter, codifying *Pure Milk Products Coop. v. NFO*, 64 Wis.2d 241 (1974).

A new provision has been added to allow the parties to a criminal action or proceeding, the prosecuting attorney, and the original and the new judge to agree to have the matter referred back to the original judge. This will aid the administration of justice in those cases where it is advantageous for everyone concerned to have the original judge take back the matter.

Notes of Decisions (111)

W. S. A. 801.58, WI ST 801.58

Current through 2017 Act 367, published April 18, 2018.

End of Document

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CERTIFICATE OF SERVICE

I certify that on June 14th, 2018, a true and correct copy of Defendant Steven Avery's Motion for Substitution of Judge, Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

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