

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0853-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000031

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES G. FREER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. James Freer appeals from a judgment convicting him of one count of first-degree sexual assault of a child, one count of second-degree sexual assault of a child, and one count of repeated sexual assault of the same child. He also appeals from an order denying his postconviction motion for

resentencing. Freer argues that the circuit court should have appointed him substitute counsel. We reject his argument and affirm.

¶2 Prior to sentencing, Freer sent the circuit court a letter requesting that the circuit court appoint him new counsel on the ground that his attorney was not communicating with him. The circuit court did not address Freer's request at the sentencing hearing. After sentence was imposed, Freer was appointed postconviction counsel and moved for postconviction relief, arguing that the circuit court should have appointed him new counsel prior to sentencing. The circuit court held a hearing on the motion. After considering Freer's motion and affidavit, and after hearing the arguments of counsel, the court made a retrospective finding that it would not have appointed substitute counsel prior to sentencing.

¶3 When a circuit court does not make an adequate inquiry into a defendant's last-minute request to discharge appointed counsel, the circuit court must hold "a retrospective hearing, at which the defendant may present whatever he deems necessary to fully articulate his reasons for wanting counsel discharged." *State v. Lomax*, 146 Wis. 2d 356, 365, 432 N.W.2d 89 (1988). Whether counsel should be relieved and new counsel appointed is committed to the circuit court's discretion. *Id.* at 359. Where, as here, a retrospective hearing has been held, we must consider the following factors as we review the circuit court's discretionary decision denying the motion for substitution of counsel:

- (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of

communication that prevented an adequate defense and frustrated a fair presentation of the case.¹

Id.

¶4 Turning to the first factor, the circuit court made an adequate retrospective inquiry into Freer’s complaint about this attorney and was well aware that Freer believed that his attorney had not communicated with him enough to present a persuasive sentencing argument. As for the second factor, we will assume that Freer made a timely request for counsel in his letter to the circuit court. The focus of our inquiry, then, is on the third factor—whether the conflict between Freer and his attorney, Ed Krueger, “was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.” *Id.*

¶5 The circuit court rejected Freer’s claim that there was a complete breakdown in the attorney-client relationship simply because Krueger had not been in contact with Freer for a period of time between the plea and sentencing while the presentence was being written. Noting that some “down time” between hearings was not unusual, the court focused on whether the alleged lack of communication prevented Krueger from presenting an adequate defense on Freer’s behalf, and concluded that Krueger was able to present an adequate defense.

¶6 This discretionary determination is supported by the record. Krueger met with Freer prior to sentencing to discuss the case. They reviewed the

¹ The State argues Freer abandoned the request for new counsel by failing to raise it again at the sentencing hearing. We reject this argument. Because Freer requested new counsel in his letter to the circuit court, the circuit court should have addressed it. See *State v. Kazee*, 146 Wis. 2d 366, 373, 432 N.W.2d 93 (1988).

presentence investigation report together in depth. Krueger submitted a letter to the circuit court on Freer's behalf before the sentencing hearing pointing out portions of the presentence report that Freer believed to be incorrect. Counsel was obviously well prepared for the sentencing hearing, which can be established retroactively by a review of Krueger's sentencing argument, which the circuit court characterized as persuasive and thorough. While Freer contends that the lack of communication resulted in an inadequate investigation of mitigating sentencing factors, Freer does not explain what mitigating factors Krueger would have discovered had they spent more time discussing his case and how the information may have aided his defense. Therefore, the circuit court properly exercised its discretion in determining that it would not have appointed substitute counsel because there had not been a breakdown of the attorney-client relationship.²

By the Court.— Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

² Freer also contends that the circuit court's comments show that it would not appoint new counsel because Freer would not be entitled to a new attorney through the public defender's office. While portions of the transcript could be read, in isolation, to support this view, the transcript, when read in its entirety, does not. The circuit court specifically acknowledged that it had the power to appoint counsel at county expense.

