COURT OF APPEALS DECISION DATED AND RELEASED

March 12, 1996

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

NOTICE

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No. 95-1476-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEVELT D. MUSGRAVES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and DIANE S. SYKES, Judges. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

FINE, J. Levelt D. Musgraves appeals from a judgment convicting him, after a jury trial, of first-degree intentional homicide while armed in the shooting death of Zebulum Davis, *see* §§ 940.01(1) and 939.63, STATS., and from the trial court's denial of his motion for postconviction relief. Musgraves was sixteen years old at the time of the shooting, and was waived into adult court.

The only issue presented by this appeal is whether Musgraves's trial counsel should have been permitted to withdraw. We affirm.

This case was here once before. Musgraves claimed that the trial court, the Honorable Jeffrey A. Wagner, presiding, erroneously exercised its discretion in not permitting Musgraves's trial counsel to withdraw on the day that the case was set for trial. We remanded the case to the trial court for an evidentiary hearing. *See* ***State v. Lomax***, 146 Wis.2d 356, 365, 432 N.W.2d 89, 93 (1988) (approving use of retrospective hearing to determine whether defendant should have been permitted to discharge trial counsel).

Both Musgraves and his trial counsel, Martin Love, testified at the hearing before the Honorable Diane S. Sykes. Although Musgraves recounted that he was unhappy with his trial counsel for a number of reasons, the only reason he asserts on this appeal is that Love did not stick with Musgraves's contention that he did not shoot Davis. Love's ultimate theory of defense was that Musgraves shot Davis but that the shooting was not intentional.[1]

On cross-examination, Musgraves admitted that he and Love were unable to find witnesses whom Musgraves said could establish an alibi for him. Indeed, Love requested and received an adjournment of more than a month in a futile attempt to locate those witnesses. Musgraves also testified that he never told the trial court prior to the day of trial that he was unhappy with Love's representation. Musgraves recognized during his testimony that he had confessed to the crime, and that two persons testified for the State that they saw him shoot Davis. Nevertheless, he told the trial court at the retrospective ***Lomax*** hearing: "That didn't matter to me. I wanted to prove my innocence."

Love also testified at the hearing. First, he told the trial court that the alleged alibi witnesses—including Musgraves's mother and some other relatives—did not support Musgraves's story. Second, Love testified that he

[1] Musgraves testified: "I wanted Mr. Love to tell the jury that I was innocent." Musgraves also testified that he objected to giving the jury the option of finding him guilty on a lesser-included offense. Love testified, however, that he would not have asked the trial court to give the jury that option if Musgraves had objected. The trial court's written decision did not resolve this conflict.

discussed with Musgraves reserving the defense of absolute innocence with the hope that they "could establish that the witnesses for the State were unreliable and incredible," and thus take "the position that he was not the shooter." Love admitted that Musgraves was not "completely in agreement" with this strategy, pointing out to the trial court that Musgraves had trouble understanding the problems the State's witnesses posed to Musgraves's case if they were believed. Love testified, however, that he did everything he could do prior to trial to find a way to present Musgraves's theory of absolute innocence.

In seeking to withdraw as Musgraves's trial counsel, Love had told Judge Wagner that Love was satisfied that Musgraves did not believe that he was "getting adequate or fair representation from me." Love also testified at the ***Lomax*** hearing before Judge Sykes that he "thought it appropriate to withdraw." He explained to Judge Sykes his rationale:

> [Musgraves] had a position that he wanted to advance that I saw now [*sic*—should be "no"] evidentiary source to support and under those circumstances, I thought we were clearly at loggerheads and that something like this would happen eventually, that is, what we're dealing with now and that I also felt that he had a right to advocate that position, whether or not he could have proven it or established -- you know, demonstrate it through evidence and that disturbed me and I thought that he was entitled to take that position if that's what he wanted to do.

In response to a question from the trial court, Love agreed, to his "best recollection," that the crux of the difficulties he was having with Musgraves was "a dispute over the nature of the defense that ought to be presented." He admitted, however, that he thought that his relationship with Musgraves had broken down irretrievably, and explained that he had "believed that I had exhausted my abilities to establish an attorney-client relationship sufficient to [Musgraves's] satisfaction and his protection."

Lomax recognized that where a defendant claims to being forced to go to trial represented by a lawyer with whom he or she has problems, a new

trial is not warranted unless "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." ***Id.***, 146 Wis.2d at 359, 432 N.W.2d at 90 (assessing the factors in evaluating "whether a trial court's denial of a motion for substitution of counsel is an abuse of discretion"). Further, a request to substitute counsel may, within the trial court's discretion, be denied if it is not timely. ***Ibid.*** Judge Sykes recognized these criteria and, in a written decision, determined that Love's request to withdraw came late—on the day of trial. The trial court explained:

> If the defendant's relationship with his counsel was so problematic as to warrant withdrawal and appointment of new counsel, then certainly that would have been known to the defendant -- and could have been made known to the court -- well in advance of the final trial date. The timing of the defendant's request in this case casts doubt on its validity.

The trial court also pointed out that in its view the conflict between Musgraves and Love was insufficient to require a re-trial, noting that disputes over trial strategy between a defendant and trial counsel "do[] not supply good cause for withdrawal of counsel and appointment of a new attorney." *See* ***State v. Robinson***, 145 Wis.2d 273, 278, 426 N.W.2d 606, 609 (Ct. App. 1988). Further, the trial court determined that it "would be hard pressed to conclude that there was a `total lack of communication'" between Musgraves and Love, and that whatever difficulties there were "did not result in an `inadequate defense' or in an `unfair presentation' of the case within the meaning of Lomax."

Although Musgraves spends considerable space in his brief in support of his view that he did not believe that Love was giving him an adequate defense, he has not shown—in any respect—how the conflicts between him and Love were "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." ***Lomax***, 146 Wis.2d at 359, 432 N.W.2d at 90; *see also* ***Morris v. Slappy***, 461 U.S. 1, 14 (1983) (defendant has no right to "`meaningful relationship'" with counsel). As the trial court recognized, "[m]ere disagreement over trial strategy does not constitute good cause to allow an appointed attorney to withdraw." ***Robinson***, 145 Wis.2d at 278, 426 N.W.2d at

609. Further, an attorney's obligation to fully and tenaciously represent his or her client does not extend to the presentation of evidence that the lawyer knows is false. ***Nix v. Whiteside***, 475 U.S. 157, 166, 172–173 (1986). Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.