COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1338-CR **Cir. Ct. No. 2003CT19**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD R. JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed and cause remanded with directions*.

¶1 HIGGINBOTHAM, J.[1] Todd R. Jones appeals a circuit court order denying his motion to substitute counsel at his sentencing hearing. Jones argues the circuit court either failed to recognize or disregarded his request to discharge his attorney and substitute alternative counsel and failed to inquire into the basis for this request. We agree and reverse the order of the circuit court and remand for a new sentencing hearing.

FACTS

¶2 Jones pled no contest to operating a motor vehicle while intoxicated, third offense, pursuant to a negotiated plea agreement. The parties agreed to jointly recommend a 155-day jail sentence, a fine totaling $3,430 and a thirty-month revocation of Jones' operating privileges.

¶3 At Jones' original sentencing hearing, on March 31, 2004, his attorney, Michele Tjader, informed the court that as part of the plea agreement, the State would not object to Jones' request to serve his sentence on electronic monitoring provided through a private firm, In House Correctional Services. Pursuant to Richland county's court rules, Jones was unable to serve his sentence through Richland county's electronic monitoring program because his work required out-of-state travel. However, the district attorney indicated he was unaware of this plea agreement. Although the State did not expressly object to Jones' request to serve his jail term through private electronic monitoring, the district attorney expressed misgivings about the proposed monitoring plan.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The circuit court then decided it did not have sufficient information to determine if Jones should be permitted to serve his sentence via private electronic monitoring and concluded there was insufficient time on the court's calendar to address its concerns with the proposed sentence. Sentencing was adjourned to a later date for a more thorough sentencing hearing with Jones' attorney expected to provide more information on private electronic monitoring.

¶5 The continued sentencing hearing was held several months later. The State reaffirmed its initial position by not objecting to private electronic monitoring. However, Jones' attorney told the court she was not prepared to present a proposal involving private electronic monitoring. In addressing the court's concern about private electronic monitoring, the following exchange occurred:

> MS. TJADER: As the Court knows, we've been sort of back and forth on this issue. It was our intention to propose to the Court private, electronic monitoring. The Court had some concerns about that and wanted to get more information, wanted me to get more information from the private company and to attempt to coordinate that with the jail to see what the jail's position was on it.
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> In order for me to do that, I needed information from my client regarding employment and a number of other things. That was never provided to me despite my repeated requests for him to provide that to me so I don't have that information for the Court. I apologize for that. It's certainly not my personal practice to be unprepared or not do something I'm supposed to do but it was outside of my control. Given that that's the case, we don't have a good proposal for private monitoring. My client has been made aware of that.
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> The plea agreement here is for the guidelines and I think that that's what the Court needs to impose. I'm certainly not in a good position to ask for more time because I don't have a good reason to ask for it and I'm not going to further delay this matter.

THE COURT: Okay, thank you. Mr. Jones, is there anything you would like to say before I pronounce sentence?

THE DEFENDANT: Actually, yes, I would. I wanted to talk to my attorney before she arrived today. She arrived about ten, fifteen minutes late so we weren't able to.

THE COURT: I understand you talked to her yesterday, is that right?

THE DEFENDANT: Briefly. That's when I first found out that some of this information was required that I had not been told.

THE COURT: Mr. Jones, I've read the transcript of the sentencing hearing back on March 31st, 2004, and you were present for that, and I laid out very clearly what my concerns were, what I would have to see if I were to consider such a request, and set this over at least once if not twice to give you an opportunity to do that but let's proceed. What would you like to say?

THE DEFENDANT: Yes, I understand what you're saying, your Honor. What I'm talking about is the particular information that I gave Ms. Tjader. I had been told that that was for the Court so that she could see that I had gotten the assessments, things like that, you know, instead of just saying it in court. Yesterday, I was told that this assessment was needed for the monitoring program which I had never been told before and really don't understand why it would be. This has been an ongoing thing with communication. I have talked to Ms. Tjader in the past about calling down there, leaving messages, messages are not returned. I'm sorry, I just, this is obviously very late, probably too late to say anything now. I do want to say that I felt Michele was doing a very good job with this other than the communication problem until this issue came up here. I did talk to another attorney yesterday. He couldn't really say a whole lot seeing as how I was not, hadn't hired him yet and I was with another attorney. He did say, however, that he would be more than happy to take my case if that was a possibility. The information that I have here is the information, some of it which I had given to Michele the last hearing, as far as how my work schedule works and things like that. So I don't really know and have not been contacted in the past few months concerning what this information might be.

> THE COURT: Okay. None of that, of course, has anything to do with sentencing factors which the Court would have in mind, Mr. Jones, but is that all you wanted to say?
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> THE DEFENDANT: Well, I obviously am not a lawyer. I don't know how everything works in court. I would like to ask the Court and, like I say, I know this is rather late, to get a stay on the sentencing so my new attorney could handle this part of it.
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> THE COURT: If that's a request to continue the sentencing hearing, that's denied. Anything else?
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> THE DEFENDANT: No.

¶6 Following this exchange, the circuit court proceeded to sentencing. Jones' request for electronic monitoring was denied and the court sentenced Jones to 155 days in jail with work-release privileges, a fine totaling $3,430, a thirty-three month revocation of his operating privileges and an alcohol assessment with driver's safety plan and ignition interlock after relicensing.

DISCUSSION

¶7 Jones argues the circuit court either failed to recognize or disregarded his request to discharge his attorney and substitute new counsel and failed to inquire into the basis for his request. Specifically, Jones argues his statements to the court constituted a request for new counsel and thus the circuit court was obligated to make a discretionary ruling on his request. Because the circuit court failed to do so, argues Jones, the appropriate remedy for the denial of his Sixth Amendment right to new counsel is a new sentencing hearing with counsel of his choice. We agree.

¶8 Whether a defendant is entitled to discharge his counsel and retain new counsel is within the circuit court's discretion. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). However, the court must exercise its discretion

on a fully informed basis; a circuit court erroneously exercises its discretion by failing to make an adequate inquiry as to whether a request for counsel is justifiable. *See* ***State v. Kazee***, 146 Wis. 2d 366, 368, 372, 432 N.W.2d 93 (1988). In addition, a circuit court erroneously exercises its discretion when it fails to demonstrate consideration of the facts upon which the court's reasoning is based. ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971). We will sustain a discretionary act if we find that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

¶9 Jones argues his statements to the circuit court about counsel's performance constituted a request for new counsel. The State implicitly concedes this point by stating that "the statements made by [Jones] regarding speaking to new counsel could reasonably be interpreted to be a request for new counsel." At sentencing, Jones stated

> I have talked to [my attorney] in the past about calling down there, leaving messages, messages are not returned.... I do want to say that I felt [she] was doing a very good job with this other than the communication problem until this issue came up here. I did talk to another attorney yesterday. He couldn't really say a whole lot seeing as how I was not, hadn't hired him yet and I was with another attorney. He did say, however, that he would be more than happy to take my case if that was a possibility....
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> ….
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> … I would like to ask the Court and, like I say, I know this is rather late, to get a stay on the sentencing so my new attorney could handle this part of it.

We agree Jones' comments could reasonably be interpreted as a request for new counsel.

¶10 In evaluating whether a circuit court's denial of a motion for substitution of counsel was an erroneous exercise of discretion, we consider a number of factors including

> (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.

Lomax, 146 Wis. 2d at 359. We conclude the circuit court failed to make the appropriate inquiry into Jones' request for a new attorney.

¶11 In the exchange we quoted extensively in ¶5 of this opinion, the circuit court's inquiry focused on whether Jones wished to make a statement prior to sentencing. Once Jones asserted he wanted a new lawyer, the circuit court simply stated that if Jones was asking for a continuance, that request was denied. The circuit court made no inquiry into why Jones wanted a new lawyer nor engaged in any of the inquiry the law requires. This constitutes an erroneous exercise of discretion. *See* ***Kazee***, 146 Wis. 2d at 368, 372.

¶12 Jones argues the appropriate remedy for the circuit court's denial of his request for substitution of counsel at his sentencing hearing is a new sentencing hearing with counsel of his choice. The State agrees. We therefore reverse the circuit court's order denying Jones' request for new counsel and remand this matter for a new sentencing hearing.

By the Court.—Order reversed and cause remanded with directions.

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