

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2016

Diane M. Fremgen
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 Nos. 2015AP1292-CR
2015AP1293-CR**

**Cir. Ct. Nos. 2010CF706
2011CF231**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. ZIMBAL,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Edward Zimbal appeals judgments convicting him of four felonies and two misdemeanors, and an order denying his postconviction

motion. He contends the trial judge erred by denying his request for substitution.¹ Because we conclude Zimbal failed to comply with WIS. STAT. § 971.20(7),² he did not properly invoke his right to substitution of a circuit court judge and his motion was properly denied.

¶2 In 2013, we reversed Zimbal’s convictions and remanded the matter for further proceedings. On October 7, 2013, the day before remittitur, the circuit court conducted a status hearing, indicated it would allow Zimbal to withdraw his no contest pleas, and it reinstated cash bail. At that hearing, the following exchange took place:

MR. ZIMBAL: I’m also asking that you recuse yourself because there is no way you can be impartial and/or bias [sic].

THE COURT: Since you probably haven’t done any research, I’ll let your attorney do research on that issue and you can address that at the status conference. I’ll deny your request at this time.

MR. ZIMBAL: I spoke to Attorney Hirsch this morning, and she said absolutely you can’t do that. The Judge must recuse himself.

THE COURT: All right. [She] can provide his authority for that at the status conference, and [she] can send it by letter beforehand, by the way, if you want it addressed beforehand.

¶3 Zimbal then wrote a letter to the court of appeals that is not a part of the record in this appeal. From this court’s response it appears Zimbal’s letter

¹ Zimbal’s oral request actually requested recusal due to alleged bias, but our decision does not rest on that distinction because the request could have been liberally construed as a request for substitution, which is subject to a more permissive standard. See *State v. Harrison*, 2015 WI 5, ¶26, 360 Wis. 2d 246, 858 N.W.2d 372.

² All references to the Wisconsin Statutes are to the 2013-14 version.

expressed some concern that the circuit court had denied his motion for recusal. The clerk of this court responded, “Regarding substitution or recusal of Judge Atkinson,” the court of appeals no longer had jurisdiction and Zimbal should consult with his trial counsel.

¶4 The state public defender appointed counsel for Zimbal on November 1, 2013, and counsel filed a written request for substitution of judge on November 18, 2013. Judge Atkinson denied the request because it did not comply with WIS. STAT. § 971.20(7), which provides:

SUBSTITUTION OF JUDGE FOLLOWING APPEAL. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

A jury subsequently convicted Zimbal of the six charges, and Zimbal appeals.

¶5 Zimbal did not properly invoke WIS. STAT. § 971.20(7). Although his oral request was made within the time set by that statute, the statute requires the request to be “filed,” which would require a written document. Any doubt about the requirement for filing a written request is clarified by § 971.20(10), which provides an example of the form a request for substitution should take, and requires the request to be signed by the defendant or his attorney.

¶6 The written request filed by Zimbal’s attorney on November 18, 2013, was not filed within twenty days of the October 8, 2015 remittitur. Therefore, the request was not timely filed under WIS. STAT. § 971.20(7). While Zimbal’s letter to this court mentioning substitution or recusal of Judge Atkinson was a writing, there is no indication it was filed with the clerk of the circuit court or Judge Atkinson.

¶7 Zimbal argues this court should apply the equitable “tolling rule” because circumstances beyond Zimbal’s control--the delay in appointment of counsel by the state public defender--resulted in the belated filing of the request. Zimbal contends he “could not file an acceptable request for substitution until he had a lawyer, but he could not get a lawyer until one was assigned by the State Public Defender.” While Judge Atkinson ruled he would not grant a request for substitution until Zimbal was represented by counsel, he did not prevent Zimbal from timely filing a written request. Unlike the situation in *State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292, and *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, 244 Wis. 2d 177, 629 N.W.2d 17, filing a timely written request for substitution was not beyond Zimbal’s control. Indeed, as mentioned above, WIS. STAT. § 971.20(10) expressly provided Zimbal an example of the form a request for substitution should take. Furthermore, nothing in the record suggests his ability to file a written request was impeded by the court or by prison or jail restrictions.

¶8 Citing *Baldwin v. State*, 62 Wis. 2d 521, 530, 215 N.W.2d 541 (1974), Zimbal argues strict construction of WIS. STAT. § 971.20 is inappropriate because that would make it “impossible to obtain the objective of this section and would frustrate the objective of the statute.” In *Baldwin*, compliance with the timing restrictions was literally impossible because the request for substitution was due before the judge was assigned. While Judge Atkinson’s comments coupled with delays in the appointment of counsel for Zimbal may have lead Zimbal to conclude the court would not grant his request within twenty days of remittitur, nothing prevented Zimbal from complying with the requirement for filing a written request within twenty days of remittitur. Compliance with the statute was not impossible.

By the Court.—Judgments and order affirmed.

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

