

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

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

**DEFENDANT’S REPLY IN SUPPORT OF
HIS MOTION FOR SUBSTITUTION OF JUDGE**

Defendant, Steven Avery, by his undersigned attorneys, respectfully submits the following reply in support of his motion for substitution of judge.

The rules of civil procedure apply to Mr. Avery’s motion.

The State argues that the rules of criminal procedure govern Mr. Avery’s motion for substitution of judge because a postconviction motion is part of the original criminal action. (State’s Obj., pp. 1-2). The State’s argument is a non-sequitur. Whether or not a postconviction motion is part of the original criminal action does not dictate which procedural rules govern postconviction proceedings. In fact, the postconviction statute provides that proceedings therein “shall be considered civil in nature, and the burden of proof shall be upon the person.” Wis. Stat. § 974.06(6). Proceedings civil in nature are governed by the rules of civil procedure. *E.g., In re Kristeena A.M.S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (noting that the rules of civil procedure apply to termination of parental

rights proceedings because they are “civil in nature”); *In re Commitment of Madison*, 2004 WI App 46, ¶ 3, 271 Wis. 2d 218, 678 N.W.2d 607 (Ct.App. 2004) (citing *State v. Rachel*, 224 Wis.2d 571, 575, 591 N.W.2d 920 (Ct.App. 1999) (holding that chapter 980 proceedings are “civil in nature” and therefore the rules of civil procedure apply). Because postconviction proceedings are civil in nature, the rules of civil procedure apply to Mr. Avery’s motion for substitution of judge.

The State’s argument on this point fails for another reason. Presumably, the State contends that the criminal rule concerning substitution of judge applies because it is more restrictive. However, criminal defendants are generally afforded more procedural rights and safeguards than civil defendants. *Racine County. v. Smith*, 122 Wis. 2d 431, 436-437, 362 N.W.2d 439 (Ct. App. 1984). The Supreme Court has construed the civil statute governing substitution of judge broadly to permit substitutions in the greatest number of cases to ensure the fairness of judicial proceedings. *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, ¶¶ 22-23, 233 Wis.2d 428, 608 N.W.2d 679 (2000). Because the unqualified right to remand exists to ensure “fairness,” it would be peculiar to grant that right more liberally to civil litigants than criminal defendants. Thus, to the extent the State’s argument rests on the premise that the right to substitution is narrower under § 971.20 than § 801.58, its position is a non-starter.¹

¹ The criminal rule for substitution does not address the right of substitution on remand from an order modifying a judgment in a postconviction appeal. Especially given that postconviction appeals are governed by procedures for civil appeals, this

The State’s objection conflicts with *Findorff* and must therefore be overruled.

The State’s objection rests primarily on the premise that “the Court of Appeals issued a limited remand order.” (State’s Obj., p. 2). The State’s position is wholly at odds with *Findorff*.

In *Findorff*, the Supreme Court held that a limited remand directs specific action that is purely ministerial. *Findorff*, 2000 WI 30, ¶ 20. Ministerial duties are those that are “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” *Id.* (quoting *Lister v. Board of Regents*, 72 Wis. 2d 282, 301 (1976)). The right to substitution does not attach if the appellate court’s remand order directs the circuit court to perform ministerial duties. *Id.* at ¶¶ 15, 20.

Conversely, if the appellate court’s remand order empowers the circuit court to exercise its discretion, the mandate requires “further proceedings” to which the unqualified right of substitution attaches. *Id.* at ¶ 15. The Supreme Court provided the following statement to clarify the term “discretion”: “Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical

is yet another reason to apply the statute for substitution of judge found in the rules of civil procedure. Wis. Stat. § 809.30(2)(L).

rationale founded upon proper legal standards.” *Id.* at ¶ 21 (quoting *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)).

In short, if the appellate court’s remand order directs the circuit court to perform a ministerial duty, then there is no right of substitution. If, however, the appellate court’s remand order requires the circuit court to exercise its discretion in discharging its duties, then the parties have the unqualified right to move for substitution.

Here, any argument that this Court’s duties are ministerial is frivolous. The appellate court has directed this Court to hold a hearing on Mr. Avery’s supplemental postconviction motion and enter written findings and conclusions. The order contemplates that this Court may ultimately grant or deny relief. In other words, this Court is to engage in “a process of reasoning” based on “facts that are of record” and reach a decision “founded upon proper legal standards.” The order requires this Court to exercise its discretion. Thus, “further proceedings” have been ordered for which Mr. Avery has the unqualified right to move for substitution.

The appellate court issued a remittitur conferring jurisdiction back to the circuit court.

The State argues that this Court should deny Mr. Avery’s motion for substitution because the Court of Appeals “did not issue a remittitur returning jurisdiction to the trial court.” (State’s Obj., p. 2). The State is incorrect. The Court of Appeals returned the case to this Court for Mr. Avery to file a supplemental postconviction motion. The appellate court directed this Court to “hold proceedings

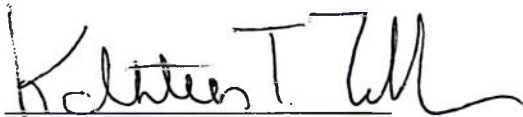
on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion.” Absent a remittitur, this Court would not have jurisdiction to take the action directed by the Court of Appeals. *State v. Neutz*, 73 Wis. 2d 520, 522, 243 N.W.2d 506 (1976) (holding that the trial court has no jurisdiction to act until it receives the remittitur); Wis. Stat. § 808.09 (“In all cases an appellate court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgment or decision.”).

The State misconstrues the Court of Appeals’ intent by retaining jurisdiction over the appeal previously filed by Mr. Avery. The appellate court’s order makes clear that Mr. Avery is not waiving any of the issues raised in his pending appeal by filing a supplemental motion with this Court. The order dictates the procedure to be followed if either of the parties remains aggrieved after this Court issues its ruling on Mr. Avery’s supplemental motion. In this sense the appellate court’s exercise of jurisdiction over the pending appeal is contingent on events yet to occur. In any event, the State misconstrues the Court of Appeals’ order by contending that it withholds jurisdiction from this Court to rule on Mr. Avery’s supplemental postconviction motion.

Wherefore, for the reasons stated in his original motion and herein, Mr. Avery respectfully requests a substitution of judge.

Dated: June 28, 2018

Respectfully submitted,



Kathleen T. Zellner
Admitted pro hac vice
Kathleen T. Zellne & Associates, PC
1901 Butterfield Road, Suite 650
Downers Grove, Illinois 60515
(630) 955-1212
attorneys@zellnerlawoffices.com



Steven G. Richards
State Bar No. 1037545
Everson & Richards, LLP
127 Main Street
Casco, Wisconsin 54205
(920) 837-2653
sgrlaw@yahoo.com

CERTIFICATE OF SERVICE

I certify that on June 27th, 2018, a true and correct copy of Defendant Steven Avery's Reply in Support of His 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:

Ms. Jacalyn C. LaBre
Manitowoc County District Attorney's Office
1010 South 8th Street
3rd Floor, Room 325
Manitowoc, WI 54220

Mr. Thomas J. Fallon
Ms. Lisa E.F. Kumfer
Ms. Tiffany Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Mark S. Williams
11708 Settlers Road
Cedarburg, WI 53012

Honorable Judge Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 North 6th Street
Sheboygan, WI 53081

Lynn Zigmunt
Clerk of the Circuit Court
Manitowoc County Courthouse
1010 South 8th Street
Manitowoc, WI 54220

A handwritten signature in black ink, appearing to read "Kathleen T. Zellner", with a long horizontal flourish extending to the right.

Kathleen T. Zellner