

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 21, 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

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

No. 96-0011-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COVAN A. GAVITT,

Defendant-Appellant.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Covan Gavitt appeals an order denying his request for substitution of judge.¹ Because Gavitt did not timely request substitution in the appropriate case, we affirm the order denying substitution

¹ This court granted Gavitt's petition for leave to appeal a nonfinal order after the State filed a response concurring in the petition for leave to appeal.

and decline to decide whether Judge Howard was a "new judge" as that term is used in § 971.20(5), STATS.

Gavitt was initially charged with kidnapping Pamela C. (case 275). He requested substitution of Judge Hoover and the case was transferred to Judge Howard. Gavitt was then charged with multiple counts arising from the abduction and sexual assault of Diane K. (case 284). That case was initially assigned to Judge Thums. After Judge Howard granted joinder of the two cases, the parties jointly agreed that Judge Howard would hear the consolidated cases.

Judge Howard was then defeated in his bid for reelection. His cases were assigned to Reserve Judge Weisel. When Judge Howard was appointed by the Governor to fill a vacancy, these cases were administratively reassigned to Judge Howard. Even though the cases were consolidated, separate orders were issued when the cases were assigned to Judge Weisel and again when they were reassigned to Judge Howard. Contending that Judge Howard is a "new judge" under § 971.20(5), STATS., Gavitt now seeks substitution of Judge Howard.

Gavitt's motion for substitution of Judge Howard was made in case 275. Because Gavitt had already substituted a judge in that case, he is not allowed a second substitution. See *State ex rel. Mace v. Green Lake County Circuit Court*, 193 Wis.2d 208, 215, 532 N.W.2d 720, 722 (1995). No motion for substitution of judge was timely filed in case 284.

Gavitt would have this court treat the request for substitution as though it had been made in case 284 because the two cases had been consolidated. Gavitt presents inconsistent arguments regarding the effective consolidation on the issue of substitution. He argues that the substitution of Judge Hoover does not preclude substitution in case 284 even though the cases were consolidated. If the cases are to maintain their separate identity for purposes of substitution of judge regardless of the consolidation, it is incumbent on a moving party to correctly identify the case in which substitution of judge is sought. The trial judge is not required to grant substitution on the basis of a motion Gavitt wished he had made, rather than the motion he actually did make.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.