

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

August 5, 1997

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.

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

**No. 96-1987-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES D. CURTIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J. , Schudson and Curley, JJ.

PER CURIAM. James D. Curtis appeals from a judgment of conviction after a jury found him guilty of possession of a controlled substance—marijuana, second or subsequent offense; obstructing or resisting an officer; and failure to pay controlled substance tax. He also appeals from an order denying his

postconviction motion for a new trial. Curtis raises two issues for review: whether the trial court erred in presiding over the case after Curtis filed a timely substitution motion; and whether his conviction for failing to pay a controlled substance tax violates his constitutional rights against compelled self-incrimination and double jeopardy. We conclude that the trial court committed reversible error in presiding over Curtis's trial and that, pursuant to *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), Curtis's conviction for violating the drug stamp law cannot stand. Accordingly, we reverse and remand, directing the trial court to vacate the drug stamp law conviction, and proceed to a new trial on the possession of a controlled substance and obstructing or resisting an officer charges.

## I.

In July 1995, Curtis was charged in a four-count criminal complaint for offenses arising out of drug possession and sales.<sup>1</sup> He entered a not guilty plea and was bound over for trial on August 14, 1995. At the time he entered his plea, Curtis was informed the Hon. Lee E. Wells would be presiding over his case; however, he later found out that the Hon. Jeffrey A. Kremers would be presiding instead. Curtis's trial counsel filed a motion for substitution under § 971.20, STATS., on August 17, 1995, before making any motions before Judge Kremers. The State objected to the substitution motion as untimely. Judge Kremers did not rule on the motion, and set a trial schedule.

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<sup>1</sup> Curtis was charged with: (1) possession with intent to deliver controlled substance—cocaine, second or subsequent offense; (2) bail jumping; (3) possession of a controlled substance—marijuana, second or subsequent offense; and (4) obstructing and resisting an officer. The State later amended the information, adding a fifth count—failure to pay a controlled substance tax. The trial court dismissed the bail jumping charge for insufficient proof. The jury acquitted Curtis on the possession-with-intent-to-deliver count.

On September 21, 1995, Judge Kremers declined to accept the substitution, but indicated that, for scheduling reasons, Curtis's case would be reassigned to the Hon. Kitty K. Brennan. Nevertheless, for reasons that are not clear in the record, Judge Kremers did preside over the trial. The jury convicted Curtis of three of the charged offenses and he was sentenced.

Curtis then brought a postconviction motion for a new trial, arguing, among other things, that his substitution request had been timely filed and therefore Judge Kremers lacked the competency to proceed in Curtis's case. The trial court denied the motion.

## II.

Curtis first argues that the trial court erred in presiding over his trial after he had timely filed for a substitution under § 971.20, STATS. We agree.

Section 971.20, STATS., provides in relevant part:

(2) ONE SUBSTITUTION. In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.

....

(4) SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

....

(9) JUDGE'S AUTHORITY TO ACT. Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail.

The State now concedes that, contrary to its position at trial, Curtis's motion for substitution was timely filed. We agree with this conclusion.

[W]here the initial appearance is conducted before the judge assigned to hear the matter, a strict application of the substitution statute's filing deadline is appropriate. However, where an intake system does not provide adequate notice of the assigned judge in advance of arraignment, the statute's filing deadlines are relaxed in order to allow a defendant to intelligently exercise the right of substitution.

*State ex rel. Tinti v. Circuit Court*, 159 Wis.2d 783, 789, 464 N.W.2d 853, 855 (Ct. App. 1990) (citations omitted).

Here, the record reflects that once Curtis found out that Judge Kremers was to preside over his case, he filed a substitution motion. Although the motion was filed after the arraignment deadline prescribed in § 971.20(4), this deadline should have been relaxed pursuant to *Tinti*. Accordingly, we conclude that Curtis's substitution motion was timely filed.

The State next argues that, although the substitution motion was timely, Curtis waived any challenge to Judge Kremers presiding over his trial when Curtis did not seek immediate relief of the denial of his substitution motion. In *State ex rel. Nowak v. Circuit Court*, 169 Wis.2d 395, 485 N.W.2d 419 (Ct. App. 1992), we held:

[O]nce a defendant is informed that a request for substitution has been denied as being untimely and the defendant desires review of that decision, it is the defendant's obligation to *promptly* seek review, either by the chief judge of the administrative district or via a writ of prohibition.

*Id.* at 397, 485 N.W.2d at 420. Thus, the State argues that the *Nowak* waiver rule applies to this case. We disagree.

While normally the *Nowak* rule is strictly applied, here the record shows that, after denying the substitution motion, Judge Kremers explicitly informed the parties that for scheduling reasons a different judge would hear Curtis's case:

[THE COURT:] From the standpoint in the week of October 2nd when the case is scheduled for trial, Judge Brennan will be here then doing the calendar. If the case goes to trial on October 4th, it will be in front of Judge Brennan. Unless Mr. Curtis objects to that, in which case we'll adjourn it to another date on my calendar.

Any objection to Judge Brennan hearing this case, [defense counsel]? Any objection to Judge Brennan hearing this case?

[COUNSEL]: I'd like to reserve my right to put in an objection.

[THE COURT]: No. I'm telling you right now Judge Brennan will be here October 4th. We are not going to have a substitution filed on October 4th.

[COUNSEL]: Okay. I have no objection to Judge Brennan hearing the case. Mr. Curtis indicates he wants a different judge.

[THE COURT]: He's getting his wish. Unless for some reason, the case doesn't go in October – but it's been transferred. October 4th for trial.

Thus, the record reflects that Curtis had no reason to seek prompt review of the denial of his motion for substitution because Judge Kremers assured Curtis that Judge Brennan would preside over the case. Given this record, the *Nowak* waiver rule cannot apply. Accordingly, we conclude that it was reversible error for Judge

Kremers to preside over Curtis's trial and we must reverse and remand for a new trial before a different trial judge.

Finally, because the supreme court recently struck down the drug stamp law as unconstitutional, we also direct the trial court on remand to vacate the drug stamp law conviction. *See State v. Hall*, 207 Wis.2d 54, 67-68, 557 N.W.2d 778, 783 (1997).

*By the Court.*—Judgment and order reversed and cause remanded with directions.

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

