COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2017

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. 2016AP2012
2016AP2013
STATE OF WISCONSIN

Cir. Ct. Nos. 1996CM710
1996CM711

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAULA L. ELBE,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMORY J. ELBE,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Sauk County: MICHAEL P. SCRENOCK, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Emory Elbe and Paula Elbe jointly challenge the decisions of the Hon. Michael P. Screnock[2] to deny their motions to vacate their judgments of conviction for disorderly conduct and to deny their motions for reconsideration. The Elbes argue that, after they were charged in 1996, the Hon. Patrick J. Taggart improperly denied their requests for appointment of counsel. I affirm because, at a minimum, Emory and Paula failed to provide Judge Screnock with sufficient evidence to conclude that Judge Taggart clearly erred or erroneously exercised his discretion in denying their 1996 motions.[3]

¶2 In August 1996, the State charged both Emory and Paula with disorderly conduct. At that time, both moved for orders appointing attorneys for them at county expense. Both Emory and Paula swore in their motions that "my total monthly income" was $1,080 and that "[m]y total monthly expenses" were $1,080.

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[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] I use the names of the two judges whose decisions are discussed in this opinion to avoid confusion that could arise from generic references to "the circuit court."

[3] Given this conclusion, I do not address other issues briefed by the parties because appellate courts strive to decide cases on narrow grounds, *see* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997), and I see no benefit in summarizing the other issues. I assume in favor of the Elbes all of their arguments that I do not address. The Elbes do not argue that the issue that I conclude is dispositive of this appeal could not be dispositive.

¶3 Promptly, on September 12, 1996, Judge Taggart held a hearing on the motions for appointment of counsel. While the information in the record is sketchy, the parties agree to this much, which is supported by the fragmentary record: Judge Taggart took at least some pertinent information from the Elbes and heard the view of an assistant state public defender that neither qualified for appointment of counsel, before denying the motions. Thereafter, both Emory and Paula entered pleas of no contest, and each received a sentence of a fine with no confinement.

¶4 The record reflects no attempt by the Elbes to challenge Judge Taggart's decisions denying their motions for appointment of counsel, either before or after Emory and Paula entered their changes of plea, continuing right up until November 2015. In November 2015, Emory and Paula, now represented by counsel, filed matching motions to vacate their judgments of conviction on the same ground. The ground was that Judge Taggart's September 12, 1996 decision denied them their right to counsel under the Sixth Amendment. The State urged denial of the motions, in pertinent part because "[b]ased on the information available, the defense has not made a prima facie showing that Judge Taggart erred in his indigency determination."

¶5 Judge Screnock held a hearing on June 6, 2016. Judge Screnock denied the motion to vacate on multiple grounds, the most pertinent of which for current purposes is that the court concluded that it had "no basis for determining that Judge Taggart failed to exercise his discretion" properly, and "I have no reason to disturb that." The Elbes filed matching motions for reconsideration, advancing arguments on a topic that I do not address, and Judge Screnock denied the motion for reconsideration.

¶6 In this appeal, still represented by counsel, the Elbes raise arguments that include a challenge to Judge Screnock's June 6, 2016 decision that there is not sufficient reason to disturb Judge Taggart's September 12, 1996 decision.

¶7 The court of appeals has explained:

> In review of a public defender indigency determination, the defendant has the burden of proving indigency by a preponderance of the evidence. Whether the defendant has the financial means to obtain counsel is a question of fact. It is the defendant who possesses the facts necessary to explain why he or she is unable to retain private counsel…. [T]he burden of proof … also applies to situations where the defendant seeks to invoke the court's inherent power to appoint counsel. Whether the facts require the appointment of counsel is left to the sound discretion of the trial court.

State v. Dean, 163 Wis. 2d 503, 513-14, 471 N.W.2d 310 (Ct. App. 1991) (citations omitted); *see also* WIS. STAT. § 977.06(4)(a) (1995-96) (circuit courts "may review" indigency determinations on their own motions or on defendants' motions).

¶8 The Elbes failed to provide Judge Screnock with a transcript of the September 12, 1996 hearing. The pertinent information before Judge Screnock included the following: handwritten minute sheets reflecting an unknown percentage of the information presented to Judge Taggart and an unknown percentage of what Judge Taggart asked or stated at the hearing; an undated, unsigned handwritten page of figures and notes purporting to address topics such as the cost of gasoline for work and rent payments, which had apparently been submitted in advance of the 1996 hearing with Emory's motion for appointment of counsel; and an affidavit from Deputy State Public Defender Michael Tobin, dated June 3, 2016.

¶9 Attorney Tobin averred that he was familiar with public defender financial eligibility requirements, including those in place in September 1996. After addressing some details and cautioning that his base of information regarding this particular case was limited, Tobin averred that, at least based on the information available to him, the assistant state public defender who was present at the hearing before Judge Taggart "properly determined in this case that the [assets available to the] defendants slightly exceeded the applicable eligibility criteria for a misdemeanor case."

¶10 I conclude that there is no starting point for the Elbes' argument that Judge Taggart either erroneously exercised his discretion or clearly erred in finding a pertinent fact.[4] In the argument section of their principal brief on appeal addressing what the record established on the financial eligibility point, the Elbes fail to cite to pertinent portions of the record, which is especially critical here given the sketchy evidentiary record presented to Judge Screnock. Compounding this problem, the Elbes purport to rely on figures that, so far as I can discern, Judge Screnock had no reason to conclude that Judge Taggart in fact credited or was obligated to credit, such as "a utility arrearage of $300 being paid at $34 per month."

[4] It is not at all times clear from the briefing whether the Elbes contend that Judge Taggart clearly erred in finding one or more facts, or that he improperly exercised his discretion based on a misunderstanding regarding administrative code provisions governing the state public defender, or some combination of the two. It does not help that the Elbes fail to engage on the topic of my standard of review on this topic, even after the State summarizes the standard of review.

¶11 I need not delve into the details of the Elbes' contentions. It is sufficient to point out that the record is sketchy on virtually every fact that could matter, and that Judge Screnock could reasonably factor into his consideration Attorney Tobin's affidavit.

¶12 For the first time in the reply brief, seemingly out of the blue, the Elbes offer poorly developed arguments referring to marital property law. If there is a meritorious argument here involving marital property law, which seems unlikely, that argument needed to be developed and contained in the principal brief on appeal. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (appellate courts need not consider arguments raised for the first time in a reply brief). Moreover, for reasons I have already explained, even if the Elbes had the benefit of one or more pertinent propositions of marital property law, the Elbes would still be building on sand, working from a record that would even in that event provide an insufficient basis for Judge Screnock to conclude that Judge Taggart's decision was fatally flawed.

By the Court.—Orders affirmed.

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