COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1256-CR **Cir. Ct. No. 2005CF6819**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN MICHAEL ORVILLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 KESSLER, J. Allen M. Orville appeals from an order denying his motion to substitute Attorney Alan D. Eisenberg as counsel or, in the alternative, for the Honorable Dennis P. Moroney to recuse himself from Orville's case. We affirm.

BACKGROUND

¶2 In a December 5, 2005 criminal complaint, Orville was charged with one count of conspiracy with intent to deliver marijuana (more than 10,000 grams), in violation of WIS. STAT. §§ 961.14(4)(t), 961.41(1m)(h)5. & (1x) (2003-04);[1] and one count of conspiracy to possess with intent to deliver cocaine (more than forty grams), in violation of WIS. STAT. §§ 961.16(2)(b)1., 961.41(1m)(cm)4. & (1x). At the time Orville was charged, Eisenberg's license to practice law was suspended[2] and Orville appeared with current counsel of record, Attorney Wendy A. Patrickus. Orville waived a preliminary hearing and the case was assigned to the Honorable Dennis P. Moroney. On February 24, 2006, the case was transferred, pursuant to a directive from Milwaukee County Chief Judge Kitty K. Brennan, to the Honorable David A. Hansher. Orville filed his request for a substitution of judge and this case was assigned to the Honorable Elsa C. Lamelas on February 27, 2006.

¶3 On July 3, 2006, Orville moved to suppress the search warrant and the fruits of the search warrant for lack of probable cause and requested a ***Franks/Mann***[3] hearing. Orville's motion and request for a ***Franks/Mann*** hearing were based on the ground that the undercover detective recklessly or intentionally

[1] All the incidents involved occurred between May 1, 2004 and August 31, 2004. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] *See* ***OLR v. Eisenberg***, 2007 WI 7, ¶¶3, 29, 298 Wis. 2d 578, 726 N.W.2d 634 (per curiam) (Attorney Eisenberg's license was suspended effective April 6, 2004 and was reinstated effective January 19, 2007.)

[3] ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

erred in translating, from Spanish to English, the taped conversations between the detective and Orville.

¶4 On July 31, 2006, due to judicial rotation, this case returned to Judge Moroney. Due to delays in obtaining transcriptions and translations of three audiotapes of these conversations, the ***Franks/Mann*** hearing did not take place until February 16, 2007. At the conclusion of the hearing, the trial court denied Orville's motion and set the matter for trial to commence on May 23, 2007.

¶5 On March 1, 2007, Eisenberg filed his notice of retainer in this case, stating that he had been retained by Orville to act as co-counsel with Orville's current attorney, Patrickus. On March 5, 2007, the trial court forwarded to Eisenberg its standing order of recusal in any cases in which Eisenberg was counsel due to its involvement, through the Office of Lawyer Regulation, in prosecuting Eisenberg's Supreme Court rule violations in the past. The letter stated, in pertinent part:

> Seeing as how you are now reinstated, I must remind you that you are not to appear in my court due to my involvement in prosecuting you relative to SCR violations in the past. This applies to all cases where you are or should be aware that I am the Court of record.
>
> Accordingly, if a case has already been assigned to me, as in the [Orville case], you will not be allowed to substitute into the matter. This … is consistent with this Court's handling of similar matters when you were reinstated previously.

The Order of Recusal stated, in pertinent part:

> IT IS HEREBY ORDERED that the Honorable Dennis P. Moroney should be and hereby does recuse himself from proceedings where Alan D. Eisenberg is acting as defense attorney of record at and immediately prior to Preliminary Hearing or Waiver of Preliminary

> Hearing and subsequent bind-over to the Circuit Court for the reasons above set forth.

¶6 On March 9, 2007, Eisenberg filed a stipulation for substitution of counsel, signed by himself, Orville, and Patrickus, substituting in for and replacing Patrickus completely as counsel for Orville in this matter. On March 12, 2007, Orville, through Eisenberg, moved the trial court to recuse itself from this case or, in the alternative, dismiss the case. On March 13, 2007, Orville, through Eisenberg, filed a second motion, moving the court to strike its March 5, 2007 letter from the record, and to vacate its March 5, 2007 order denying substitution of counsel. On March 19, 2007, Orville, through Eisenberg, filed a third motion requesting that no further proceedings occur and no further orders be issued until a hearing on his motion for substitution of counsel was conducted. The motion also requested an order allowing Eisenberg to appear for Orville in this case "because only the Wisconsin Supreme Court can bar an attorney from appearing in Court."

¶7 On April 23, 2007, a hearing was held on Orville's motions. After hearing argument from Eisenberg and the State,[4] the trial court analyzed the facts of this case in light of existing law and SCR 60.04. First, the court noted that it had a standing order with the Milwaukee County Circuit Court Clerk's Office, of which Eisenberg would have received notice, that the trial court should not be assigned to any cases in which Eisenberg was involved, as counsel or otherwise. The trial court noted that it did this to ensure that a party would not then need to use its one, of right, substitution of judge to remove itself from a case in which the party wanted to have Eisenberg as its counsel. The trial court next noted that he

[4] Patrickus was also present at the hearing, but did not present any additional argument to that presented by Eisenberg.

had no bias toward Orville in this case. Third, the trial court reviewed WIS. STAT. § 757.19(2)(g)[5] to determine whether it needed to recuse itself from any case in which Eisenberg was a defendant's counsel, concluded that it must do so, and that its standing order accomplished the written disqualification requirement of § 757.19(5).[6] The trial court then examined its duties and responsibilities under the Judicial Code of Ethics, SCR 60.04(4) and (6),[7] and concluded that it must

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[5] WISCONSIN STAT. § 757.19(2), entitled "Disqualification of judge," states in pertinent part:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> ….
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

[6] WISCONSIN STAT. § 757.19(5) states: "When a judge is disqualified, the judge shall file in writing the reasons and the assignment of another judge shall be requested under [WIS. STAT. §] 751.03."

[7] WISCONSIN SUPREME COURT RULE 60.04 states, in pertinent part:

> **A judge shall perform the duties of judicial office impartially and diligently.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.
>
> ….
>
> **(4)** Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

(continued)

recuse itself because as it "didn't want to put any client in a position that [the court] did not … believe counsel," it was appropriate for the trial court to not sit on any case where Eisenberg was serving as counsel to any party.

¶8 The trial court then discussed the relevant case law regarding an individual's right to the assistance of counsel, noting that this right does not "guarantee the choice of counsel." The trial court noted that in determining whether to allow Eisenberg to substitute in as counsel for Orville, and thereby require the trial court's recusal from the case, the court was required to balance Orville's "constitutional right to counsel of choice against the societal interest and prompt and effective administrat[ion] of justice, and that [that] includes the administration of [its] Court's process." Significantly, the trial court noted that "the issue becomes whether or not this right of counsel of choice is being used to manipulate this Court to recuse itself out of handling the case." In analyzing this issue, the court utilized the procedures set forth in ***In re BellSouth Corp.***, 334 F.3d

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> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> ….
>
> **(6)** A judge required to recuse himself or herself under sub. (4) may disclose on the record the basis of the judge's recusal and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive recusal. If, following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be required to recuse himself or herself and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

941 (11th Cir. 2003).[8] As to recusal history and the trial court's standing order, the court found that Eisenberg was aware of the trial court's notice of recusal for about eight or nine years. The court then examined the facts of this case in relation to the factors set forth in ***BellSouth***.[9] In reviewing the history of Orville's case, and any delay, investment of judicial time, disruption of the court docket, or prejudice to the other parties recusal would cause, the trial court found that the case had been going on approximately sixteen and a half months and concluded that recusal would be disruptive. As to whether the motion for substitution and

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[8] The court's analysis in ***In re BellSouth Corp.***, 334 F.3d 941 (11th Cir. 2003), involved the federal judicial recusal statute, 28 U.S.C. § 455, which states, in pertinent part:

> **(b)** He shall also disqualify himself in the following circumstances:
>
> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> ….
>
> **(e)** No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)….

[9] The ***BellSouth*** court, in addition to examining the law governing judicial recusal, also examined the lawyer disqualification versus judicial recusal factors set forth in ***Robinson v. Boeing Co.***, 79 F.3d 1053 (11th Cir. 1996) (per curiam). ***BellSouth***, 334 F.3d at 962. These factors include: "[T]he fundamental right to counsel, the court's docket, the injury to the plaintiff, the delay in reaching decision, the judicial time invested, the expense to the parties objecting, and the potential for manipulation or impropriety." ***Id.*** (quoting ***Robinson***, 79 F.3d at 1055). The ***Robinson*** court noted that a party "showing an overriding need [for the particular attorney], rather than just convenience, a need that would reflect upon the litigant's ability to have its case fairly presented, rising to constitutional due process concerns, would trump both time delay and the loss of prior judicial activity." ***Id.***, 79 F.3d at 1056. The ***BellSouth*** court also noted that it considered these factors to not be exclusive, but rather, merely to be considered, commenting "that the *Robinson* approach of considering relevant facts is sound" in that it is "a balancing approach, weighing the significance of each relevant factor" and agreeing with the lower court "that the most significant fact in [that] case involve[d] the manipulation of the random assignment system." ***BellSouth***, 334 F.3d at 962.

recusal was a veiled attempt at judge shopping, the court noted the ***BellSouth*** court

> established a strong but rebuttable presumption that the reason for the proposed substitution of counsel is to cause the recusal or disqualification of the assigned judge, [and that it] can't help but think that that [is] being done in this case here in view of the length of time, the fact that the time for substitution on the case … is over and the fact that [it] had just ruled on what was initially advised to the Court as a dispositive motion which turned out to be non-dispositive.

The trial court concluded that, based on the totality of the record, this late request for substitution was being made "to manipulate in order to obstruct the processing of a case by the courts or to interfere with the administration of justice."

¶9 The trial court then denied the motion in its entirety, and directed Patrickus to remain as Orville's counsel. Orville petitioned this court to be allowed to file an interlocutory appeal, which this court granted on June 25, 2007.

DISCUSSION

¶10 The Sixth Amendment to the United States Constitution provides that an accused in a criminal prosecution has the right to assistance of counsel for his or her defense, *see* ***United States v. Gonzales-Lopez***, 548 U.S. 140, 144 (2006), as does article I, § 7 of the Wisconsin Constitution.[10] This right includes "the right of a defendant who does not require appointed counsel to choose who will represent him" or her. ***Gonzales-Lopez***, 548 U.S. at 144 (citing ***Wheat v.***

[10] Orville does not argue that article I, § 7 of the Wisconsin Constitution, containing Wisconsin's right-to-counsel provision, should be interpreted to include any additional rights than those provided under the Sixth Amendment to the United States Constitution and the United States Supreme Court's interpretation of same.

United States, 486 U.S. 153, 159 (1988)). This right to counsel of choice is not absolute but rather "'is circumscribed in several important respects.'" ***Id.*** (quoting ***Wheat***, 486 U.S. at 159). A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." ***Id.*** at 152 (citations omitted); as applied recently in Wisconsin by this court, *see* ***State v. McMorris***, 2007 WI App 231, ¶17, 306 Wis. 2d 79, 742 N.W.2d 322 ("[A] defendant has only a presumptive right to employ his or her own chosen counsel.").

¶11 A trial court may disqualify an attorney from representing a particular defendant "in those cases in which counsel has an actual conflict or 'serious potential for conflict.'" ***State v. Miller***, 160 Wis. 2d 646, 653-54, 467 N.W.2d 118 (1991) (quoting without attribution ***Wheat***, 486 U.S. at 164). ***Miller*** explained that in ***Wheat***,

> [t]he United States Supreme Court enumerated three institutional interests that are jeopardized by a criminal defense attorney who has an actual or serious potential conflict of interest: First, a court's institutional interest in ensuring that "criminal trials are conducted within the ethical standards of the profession." Second, a court's institutional interest in ensuring that "legal proceedings appear fair to all who observe them." Third, a court's institutional interest that the court's "judgments remain intact on appeal" and be free from future attacks over the … fairness of the proceedings.

Miller, 160 Wis. 2d at 654 n.2 (citations omitted).

¶12 A trial court's decision to allow substitution of counsel is reviewed under an erroneous exercise of discretion standard. ***McMorris***, 306 Wis. 2d 79, ¶18. "Where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge

could reach and (b) consistent with applicable law, we will affirm the decision." ***Id.*** (citation, brackets and one set of quotation marks omitted).

¶13 Frequently, parties seeking to substitute counsel seek a continuance, which can delay the proceedings. *See, e.g.*, ***Phifer v State***, 64 Wis. 2d 24, 28-32, 218 N.W.2d 354 (1974). In this case, Orville asserts that he was not requesting such a continuance, but rather that Eisenberg had been working on the case for months and had filed numerous motions (a claim supported in the record only by Eisenberg's argument at the April 23, 2007 hearing and the motions relating to substitution filed in March 2007). However, because of the trial court's nine-year standing order that it must not be assigned any case that Eisenberg was counsel of record for the defendant, and with trial scheduled to commence one month after the hearing on the motion for substitution, a continuance was likely inevitable as the newly assigned court would need to schedule the trial on its calendar. Accordingly, we will review the trial court's refusal to grant the motion for substitution as if the motion was for substitution and for continuance.

¶14 A trial court, when attempting to strike a proper balance between a defendant's constitutional right to counsel of choice and the public's interest in the efficient administration of its judicial system, has several factors which it can use to assist it. ***McMorris***, 306 Wis. 2d 79, ¶19. These include, but are not limited to:

> [T]he length of delay requested; whether competent counsel is presently available and prepared to try the case; whether prior continuances have been requested and received by the defendant; the inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory.

Id. We have specifically noted that "[t]he right to counsel cannot be manipulated to obstruct the orderly procedure for trial or to disrupt the administration of

justice." ***State v. Coleman***, 2002 WI App 100, ¶17, 253 Wis. 2d 693, 644 N.W.2d 283.

¶15 Orville makes several arguments in support of his claim that he should be allowed to have Eisenberg as his new counsel in this case, which we have synthesized into the following four categories: (1) the court's denial of his motion for substitution violates his Sixth Amendment right to counsel because the facts of his case do not fall into the fact-specific exceptions to that right identified in the case law cited by the trial court, and that he is being treated less favorably than indigent defendants who are entitled to at least one change of counsel if they so choose; (2) because he never knew of the trial court's standing order barring Eisenberg from appearing in any case before it, and because Orville's first choice of counsel would have been Eisenberg had Eisenberg been licensed to practice law at the commencement of this case, the trial court's assertion that Orville is judge shopping is unfounded; (3) when the trial date was moved from May to September 2007 "due to the State not providing crucial discovery information about a key witness," the balance swung in favor of his constitutional right to have counsel of his choice over a now less-pressing societal interest in the efficient administration of justice; and (4) the trial court's determination that the motion for substitution was only a manipulative ploy, as well as the trial court's comments throughout the April 23, 2007 hearing, demonstrate that the trial court was biased against Orville because of his choice of Eisenberg to be his counsel.

¶16 The State argues that: (1) Orville's choice of Eisenberg as counsel was a "thinly-veiled attempt" to force the trial court to recuse itself after Orville obtained an unfavorable decision on his suppression motion; (2) the trial court's standing order provides the proper safeguard to parties to ensure that no bias results from the longstanding conflict of interest between Eisenberg and the trial

court; (3) the trial court's recusal at this stage of the litigation would disrupt the efficient administration of justice and judicial assignment of cases; and (4) Orville has competent counsel in nineteen-year criminal defense counsel, Patrickus, and he has not presented any argument or facts that would warrant her withdrawal from this case.

¶17 The timeline of this case is instructive. Orville was initially charged in this case in December 2005, while Eisenberg's license to practice law was suspended. Because of a series of delays relating to the translation and transcription of various audiotapes that served as support for probable cause for the search warrant in this case, the case moved through the judicial rotation and on July 31, 2006, was assigned to Judge Moroney. On January 19, 2007, Eisenberg's license to practice was reinstated. Orville did not retain Eisenberg at that time.

¶18 A ***Franks/Mann*** hearing on Orville's motion to suppress was heard and denied on February 16, 2007. On March 1, 2007, after the trial court denied Orville's suppression motion, Orville first filed his notice of retainer of Eisenberg as co-counsel with Patrickus. The trial court promptly responded to this notice by letter dated March 5, 2007, reminding Eisenberg of the trial court's standing order of approximately nine years that Eisenberg may not appear in any cases pending before it. At that time, approximately two months before trial, Orville was on notice as to the reason for the trial court's refusal to allow Eisenberg to appear and had the opportunity at that time to hire new counsel to assist or replace Patrickus,[11]

[11] The record discloses no substantive complaints by Orville about Patrickus's performance or their ability to effectively communicate.

if that was his wish, which would not have forced the recusal of the trial court assigned to his case.

¶19 Orville argues that ***Gonzales-Lopez*** supports his first claim that he is entitled to have any counsel he wants, at any time in the proceedings that he wants, because he has retained, rather than appointed, counsel. ***Gonzales-Lopez*** does not support his claim, however. As noted above, choice of retained counsel is not absolute. ***Id.***, 548 U.S. at 144. Rather, the Supreme Court in ***Gonzales-Lopez*** noted that a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar," ***id.*** at 152 (citations omitted), and it reversed the trial court's denial of counsel, relying on the government's concession that the defendant was denied his Sixth Amendment right to counsel of choice, ***id.*** at 150. The State makes no such concession here. Accordingly, we must analyze whether the trial court's discretionary decision to deny Orville's motion unconstitutionally deprived Orville of his Sixth Amendment right to counsel.

¶20 When the Sixth Amendment right to counsel of choice would lead to the need to continue a trial or otherwise interfere with the public's interest in the efficient administrative of its judicial system, the right must be balanced against that public interest. *See* ***McMorris***, 306 Wis. 2d 79, ¶19. In ***McMorris***, we set out factors a court may use in weighing this balance. ***Id.*** Several of those factors are implicated in this case. First, several continuances of this action had already occurred to facilitate the obtaining of translations and transcripts of tapes for use at the hearing on Orville's suppression motion. *See* ***id.*** Second, Orville had competent counsel in Patrickus, an attorney with nineteen years of criminal defense experience, who had been working on this case for the previous sixteen and one-half months and for whom Orville made no representations that would

warrant her removal as counsel. *See* ***id.*** Third, the length of the delay was uncertain due to the need to have the case reassigned if Eisenberg were allowed to substitute in as counsel, causing inconvenience to the witnesses and the court. *See* ***id.*** Finally, whether the motion for substitution and its corresponding need for a delay was for legitimate or dilatory purposes, the trial court, in its decision at the conclusion of the April 23, 2007 hearing on the motion for substitution, noted that: (1) the trial was scheduled to commence on May 23, only one month's time; (2) Eisenberg had notice of its standing order to not be assigned to any case in which Eisenberg was counsel for any of the parties, which order had been in place for approximately nine years; (3) the March 5, 2007 letter with attached standing order only clarified how to handle circumstances where Eisenberg did not begin a case as counsel of record, but first sought to substitute in after a case had been pending for some time and was assigned to this trial court; (4) the request for substitution came only after the trial court had denied Orville's suppression motion; and (5) if Orville had really wanted Eisenberg to be his counsel, the request for substitution should have been made when Eisenberg's license to practice law was reinstated, which occurred approximately one month prior to the hearing on Orville's motion, rather than after, in what appeared to be an attempt to have a motion for reconsideration considered by a different trial court.

¶21 Orville next argues that the trial court's conclusion that he was using the fact of the standing order to judge shop is erroneous because Orville would have no way of knowing about the standing order. It is undisputed in the record that Eisenberg was aware of the standing order. Orville asserts that he had originally wanted Eisenberg to represent him and that it was Eisenberg who referred Orville to Patrickus. Accordingly, if Orville was unhappy with the result of the suppression hearing, and contacted Eisenberg (the person who referred

Orville to her), Eisenberg, aware of the standing order of the trial court, could have referred Orville to a third attorney. Instead, Eisenberg allowed Orville to retain him, with the knowledge that taking Orville on as a client would necessitate the recusal of the judge who had just denied Orville's suppression motion, a motion that Orville postulates, in his briefing to this court, would have been dispositive of the State's case against him if it had been granted. By causing this trial court to recuse itself, any motion for reconsideration of this "dispositive" motion would be before another trial court.

¶22 In their analysis, both the trial court, at the April 23, 2007 hearing, and the State, in its brief to this court, analogized the present situation to the facts underlying the federal, Eleventh Circuit, decision in ***BellSouth***. In ***BellSouth***, the issue was whether a defendant in a civil suit could be represented by a law firm that employed the assigned judge's nephew. ***Id.***, 334 F.3d at 943-46. The plantiffs moved to disqualify the attorney and his firm, alleging that the defendant had deliberately chosen the attorney and his firm so that the judge would be compelled to disqualify himself. ***Id.*** at 946. The subject district judge set the matter for hearing before another judge in the district. ***Id.*** That judge granted the plaintiff's motion to disqualify the attorney and his firm. ***Id.***

¶23 The defendant sought a writ of mandamus compelling the district court to vacate its order disqualifying the judge's nephew and his firm from representation in the case. ***Id.*** at 943. The Eleventh Circuit declined to grant the writ, concluding that the defendant and counsel had not proven entitlement to the writ. ***Id.***

¶24 In reviewing whether the representation should have been allowed, the Eleventh Circuit noted that a review of the subject judge's calendar revealed

that his nephew's firm had appeared in fifteen cases which then required the judge to recuse himself. ***Id.*** at 945. In response to this disruption to its calendar, the district established a standing order "to govern the consideration of motions to add or substitute counsel where such appearance would raise a conflict with the assigned judge." ***Id.***

¶25 The ***BellSouth*** court reviewed the validity of this standing order and concluded:

> When circumstances exist involving the selection of counsel with the sole or primary purpose of causing the recusal of the judge, we believe that the right to counsel of choice can be overridden … [and] the right to counsel of choice (even in the criminal context of the Sixth Amendment) must yield to the district court's discretion to disqualify an attorney for misconduct … [or] if "counsel … [was] chosen solely or primarily for the purpose of disqualifying the judge," … [or if] a party's selection of counsel [was] "motivated by a desire to disqualify the trial judge to whom the case was randomly assigned" as a "manipulation or impropriety."

Id. at 956-57 (citations omitted). The court extended this reasoning further, to cases on appeal, quoting the Second Circuit in ***In re FCC***, 208 F.3d 137 (2d Cir. 2000):

> "Once the members of a panel assigned to hear an appeal become known or knowable, counsel thereafter retained to appear in that matter should consider whether appearing might cause the recusal of a member of the panel…. It is clear … that tactical abuse becomes possible if a lawyer's appearance can influence the recusal of a judge known to be on a panel. Litigants might retain new counsel for rehearing for the very purpose of disqualifying a judge who ruled against them. As between a judge already assigned to a panel, and a lawyer who thereafter appears in circumstances where the appearance might cause an assigned judge to be recused, the lawyer will go and the judge will stay. This practice preserves the neutral and random assignment of judges to cases, and it implements

> 'the inherent power of this Court to manage and control its docket.'"

BellSouth, 334 F.3d at 957 (quoting ***In re FCC***, 208 F.3d at 139) (ellipses in original). Finally, the court noted that these types of cases also raise concerns under rules governing lawyer ethics. ***Id.*** at 957-58. While noting that only a few courts have addressed this issue, the ***BellSouth*** court provided two exemplar cases. In a Supreme Court of Michigan case where a litigant allegedly attempted to manipulate the random assignment of cases by retaining an attorney who was related to a judge, the Michigan court held that:

> "It is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications, selling the lawyer's family relationship rather than professional services. A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to discipline."

Id. at 957-58 (citing ***Grievance Adm'r v. Fried***, 570 N.W.2d 262, 267 (Mich. 1997). The second case, from the federal district of Utah, stated: "'attempts to manipulate the random case assignment process are subject to universal condemnation.'" ***Id.*** at 958 (quoting ***United States v. Phillips***, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999)).

¶26 The ***BellSouth*** court also analyzed whether the standing order interfered with an individual's constitutional right to choice of counsel and whether the federal judicial recusal statute, 28 U.S.C. § 455, required recusal of the judge. ***Bellsouth***, 334 F.3d at 955. The ***BellSouth*** court ultimately did not reach the issue of whether the standing order "improperly shifted the burden" to the party seeking to retain the nephew's firm to rebut the "strong presumption" included in the subject standing order that hiring the nephew's firm was motivated by the desire to force a recusal, because the nephew's firm was involved at the

outset of the case. ***Id.*** at 960. It concluded, however, that while the judicial recusal statute "imposes a bright-line duty on judges to recuse in the designated circumstances, both litigants and lawyers also have a duty to disavow and avoid manipulations of the random assignment system." ***Id.*** at 958. The ***BellSouth*** court distinguished the retention of counsel at the commencement of an action from a "party's midstream change of counsel," noting:

> A party should not be allowed to "test the waters" with a judge and, having found preliminary rulings not to its liking, stage a conflict so as to try its luck with a replacement judge. When a party changes counsel under such circumstances so as to create a conflict where none existed, there is a combination of knowledge and suspicious timing that provides an inference of intent.

Id. at 961 (citation omitted).

¶27 In this case, Eisenberg was aware of the standing order that this trial court would recuse itself from any case in which Eisenberg was counsel of record. Eisenberg was aware, with his filing of the notice of retainer with this trial court if not before, that Orville's case was before this trial court. The March 5 letter from the trial court to Eisenberg, almost three months before the scheduled trial date, further reminded Eisenberg of the standing order and provided Orville with the opportunity to find new counsel or new co-counsel if he so chose, without the need for a recusal or a continuance of the trial date. The trial court's finding, that the motion to substitute as counsel that required the trial court to recuse itself (in light of Eisenberg's knowledge of its standing order and the recent adverse ruling on the motion to suppress) created the "suspicious timing that provides [for] an inference of intent" of an improper purpose for the substitution, is not clearly erroneous. *See* ***id.***; *see also* ***Robinson v. Boeing Co.***, 79 F.3d 1053, 1056 (11th Cir. 1996) (circumstantial evidence is sufficient to consider improper intent).

¶28 Orville argues that any reliance on facts that support a finding that his request for Eisenberg as counsel caused undue delay is moot because the trial was subsequently continued to September 2007, based on the trial court's granting Orville's motion relating to the State's "withholding of crucial discovery information about a key witness," and therefore, any potential interference with the efficient administration of justice ceased to exist. Because we have determined that the trial court did not erroneously exercise its discretion when it found that Orville's request for Eisenberg to substitute as counsel was based on the improper motive of forcing the trial court to recuse itself, we need not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (when one sufficient ground for support of the judgment has been declared, no need to discuss the others urged).

¶29 Finally, Orville's argument that the trial court only found his motion for substitution a manipulative ploy, as reflected in the trial court's comments during the April 23, 2007 hearing, because it was biased against Orville because of Orville's choice of Eisenberg as his counsel, is also not supported by the record. The trial court acknowledged that it had put the standing order in place because it "didn't want to put any client in a position that [the court] did not believe … counsel." The trial court conducted a hearing on the motion for substitution, allowing for argument by Eisenberg, the State and Orville's current counsel, Patrickus. The trial court reviewed the relevant statutory and case law, as well as the Wisconsin Supreme Court rules governing judicial ethics. The trial court then applied the facts to the appropriate law and reached a conclusion that a reasonable judge could reach. Additionally, in proceedings after the motion for substitution was denied, the trial court ruled favorably toward Orville on another pretrial motion. The record reflects that the trial court did not show bias against Orville.

¶30 Based on our review of the record, the trial court's findings are not clearly erroneous. Reviewing the trial court's discretionary decision to deny Orville's motion for substitution, we determine that the trial court applied the appropriate law to those, thereby preserving Orville's Sixth Amendment rights to counsel, and that the trial court reached a conclusion that a reasonable judge could reach. ***McMorris***, 306 Wis. 2d 79, ¶18.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.