

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 8, 1995

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. 95-0890-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIDNEY EARL RUSHING,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed and remanded.*

SCHUDSON, J.¹ Sidney Rushing appeals from the judgment of conviction for retail theft, habitual criminality, and from the trial court order denying his motion for postconviction relief. He argues that the trial court failed to make an adequate inquiry into his request for new counsel.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

On November 16, 1993 Rushing was charged with retail theft-habitual criminality. From November 23, 1993, until the issuance of a bench warrant for him on May 10, 1994, Rushing was represented by Assistant State Public Defender Glen Yamahiro. On August 11, 1994, Rushing was appointed new counsel, Stanley Michelstetter.

On August 16, 1994 Rushing appeared for a status date. Mr. Michelstetter informed the court that Rushing was dissatisfied with his representation and desired new counsel. Although Michelstetter advised the court that he would file a formal motion to withdraw, the trial court immediately denied the motion:

MR. MICHELSTETTER: Your Honor, we have had—I have had discussions with Mr. Rushing, who has indicated that he does not wish at this time to enter into a plea agreement. I have reviewed that with him. He also indicated to me that he's dissatisfied with my representation and that he would prefer to have a different attorney if that is possible. I am going to file a motion for—motion to withdraw, and I would just note that I am scheduled to be in this court on August 25th at 8:30, and would request the Court to set that motion to withdraw at that time. I will notify the Public Defender accordingly.

THE COURT: He has already filed a demand for a speedy trial, so I don't know that we're going to have time to get other counsel involved in the case, and its time limits are running at this point. You have been appointed by the Public Defender?

MR. MICHELSTETTER: I have been appointed by the Public Defender. I replaced another counsel.

THE COURT: All right. They only come up with two attorneys. The defendant has every right to be represented by an attorney, but it's not an attorney of his choosing, so I guess I can tell you right away at

this point the motion to withdraw would have to be denied.

MR. MICHELSTETTER: Okay. Then I will—

THE DEFENDANT: I want—can I say something?

THE COURT: What is it?

THE DEFENDANT: I would like to say how can you deny a motion that's not ineligible [sic] right now with this court?

THE COURT: It's denied.

Rushing argues that the trial court failed to conduct the hearing required under *State v. Lomax*, 146 Wis.2d 356, 432 N.W.2d 89 (1988). The State agrees.

In reviewing whether a trial court's denial of a motion for substitution of defense counsel is an erroneous exercise of discretion, this court must consider a number of factors, including:

- (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Lomax, 146 Wis.2d at 359, 432 N.W.2d at 90. Here, as the parties agree, the trial court provided no inquiry into Rushing's request for new counsel. In this case, not only did the trial court erroneously exercise its discretion by failing to make the required inquiry when Rushing first made his request, but it again failed to make any inquiry when Rushing attempted to obtain the required hearing through his postconviction motion. The remedy for a trial court's failure to

make that inquiry is a retrospective hearing for consideration of the *Lomax* criteria. See *State v. Kazee*, 146 Wis.2d 366, 376, 432 N.W.2d 93, 97 (1988).

Accordingly, this court reverses and remands to the trial court for a *Lomax* hearing.

By the Court. – Judgment and order reversed and remanded.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.