STATE OF WISCONSIN
IN THE SUPREME COURT

Case No. 99-1940-CR

STATE OF WISCONSIN,
Petitioner-Respondent-Respondent

v.

LAWRENCE P. PETERS, JR.,
Respondent-Appellant-Petitioner

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

I. DID THE LOWER COURTS ERR IN REJECTING MR. PETERS'S COLLATERAL ATTACK ON A PRIOR CRIMINAL CONVICTION FOR OPERATING AFTER REVOCATION BASED UPON THEIR CONCLUSION THAT THERE WAS NO VIOLATION OF MR. PETERS'S DUE PROCESS RIGHT TO BE PHYSICALLY PRESENT IN COURT WHEN HIS GUILTY PLEA WAS TAKEN BY CLOSED CIRCUIT TELEVISION FROM THE SHAWANO COUNTY JAIL EVEN THOUGH HE WAS NOT REPRESENTED BY COUNSEL AT THE TIME?

Trial court: Acknowledged that the closed circuit television procedure violated Sec. 971.04 Stats. but concluded that this statutory violation did not violate any constitutional right of Mr. Peters. For this reason, the Court rejected Mr. Peters's collateral attack upon the prior conviction.

Court of Appeals: Affirmed the trial court using the same reasoning.

CRITERIA SUPPORTING PETITION

Petitioner submits that this court should grant the petition for review because this case meets the following criteria set forth in Rule 809.62(1) Stats.:

(a) A real and significant question of federal and state constitutional law is presented;

(b) The petition for review demonstrates a need for the Wisconsin Supreme Court to establish policies and guidelines concerning the use of closed circuit television in the processing of criminal cases;

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

. . . . . .

2. The question presented is a novel one, the resolution of which will have statewide impact; [and]

3. The question presented is not factual in nature but rather is a questions of law of the type that is likely to recur unless resolved by the supreme court.

This is a one-issue case involving a first-impression constitutional issue of a significant and recurring nature and of major importance to bench and bar and to Wisconsin jurisprudence. The constitutional issue involves the constitutional due process right of an unrepresented criminal defendant to be present in court for his guilty plea hearing and sentencing. Since the guilty plea and sentencing in this case were done by closed circuit television from the Shawano County Jail, this case would also require this Court to consider the critical question of the constitutional implications of using closed circuit television in processing criminal cases.

There is a full factual record on which to base the decision on this issue and it

was fully briefed in both the trial court and the Court of Appeals by both parties. There is no need to resolve any factual questions in order to decide this issue.

This question is both important and constantly recurring and its resolution will both clarify the constitutional law of Wisconsin and provide important guidance to bench and bar on the use of closed circuit television in the processing of criminal cases. Any decision in this case will therefore serve as a useful guide to bench and bar in future cases. This case clearly meets the criteria for review by this Court.

STATEMENT OF THE CASE

Procedural Status.

On April 14, 1999, Defendant-Appellant Lawrence P. Peters, Jr. was stopped by the Shawano City Police and issued a traffic citation for operating a motor vehicle after revocation of his license, fifth offense in violation of Sec. 343.44(1) Stats. (App. 101) A formal criminal complaint was issued the next day. Mr. Peters was arraigned that same day and committed to jail in lieu of bond. On April 21, 1999, counsel for Mr. Peters filed a motion to void one of the four prior OAR offenses for penalty enhancement purposes (App. 102-103). This motion dealt with the April 4, 1996 conviction; a transcript of the proceedings on that date was attached to the motion (App. 104-107). On May 25, 1999, the motion was denied and Mr. Peters pled guilty as charged (R:9). He was sentenced to six months in jail and fines, costs and surcharges totaling $2,500.00 (App. 101).

The Court of Appeals sua sponte ordered this case to be heard by a three judge panel and invited the Attorney General of Wisconsin to participate in the proceedings. After receiving briefs from both the office of the Shawano County District Attorney and the Attorney General of Wisconsin as well as briefs from Mr. Peters, the Court of Appeals affirmed the decision of the trial court in an opinion recommended for publication (App. 137-144). This petition for review followed.

Statement of Relevant Facts.

Prior to being stopped on April 14, 1999, Mr. Peters had been convicted of

operating after suspension or revocation on four separate occasions: 1. June 19, 1995 in Oconto County; 2. April 4, 1996 in Shawano County; 3. October 2, 1996 in Shawano County; and 4. October 4, 1996 in Brown County. The April 21, 1999 motion filed in this case challenged only the second of these convictions: the April 4, 1996 conviction in Shawano County (App. 102-103).

On April 4, 1996, Mr. Peters entered a plea of "no contest" to the offenses of operating a motor vehicle under the influence of alcohol, second offense, operating a motor vehicle with a prohibited blood alcohol level, second offense and operating a motor vehicle after suspension or revocation of his license, apparently also as a second offense (App. 102-107). Mr. Peters was not physically present in court for his arraignment; he was in the Shawano County jail and the proceeding was conducted on closed circuit television (App. 104). The motion to void prior OAR offense for penalty enhancement purposes focused on this plea procedure as both a statutory violation--Sec. 967.08 Stats. and Sec. 971.08 Stats.--and a constitutional violation--due process and the Sixth Amendment and Fourteenth Amendments (App. 102-103).

ARGUMENT

I. THE LOWER COURTS ERRED IN CONCLUDING THAT THERE WAS NO VIOLATION OF MR. PETERS' CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT IN COURT WHEN THE TRIAL COURT TOOK HIS GUILTY PLEA BY CLOSED CIRCUIT TELEVISION FROM THE SHAWANO COUNTY JAIL EVEN THOUGH HE WAS NOT REPRESENTED BY COUNSEL AT THE TIME

Although the state raised several other issues along the way, the Court of Appeals decision in this case (App. 108-117) reaches the merits of the constitutional due process issue. For this reason, none of the issues discussed in the Court of Appeals briefs not directly related to the constitutional due process issue are relevant here. However, before turning entirely to constitutional law, it is important to begin by noting that the statutory violation which the Court of Appeals found to have occurred in this case (App. 111-112) cannot be separated as neatly and cleanly from the constitutional issue as that Court's opinion might seem to suggest (App. 113, paragraph 10). Sec. 971.04 Stats. and Sec. 967.08 Stats. are the statutory vehicles by which Wisconsin law implements the right of a criminal defendant to be present during the proceedings against him State v. Vennemann, 180 Wis.2d 81, 92, 508 N.W.2d 404 (1993). These statutes thus have a constitutional basis in Article I, Section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. May v. State, 97 Wis.2d 175, 186, 293 N.W.2d 478 (1980). A violation of those statutes such as the one which occurred in Mr. Peters' case on April 4, 1996 therefore must, of necessity, have constitutional implications. The statutory violation cannot be totally divorced from

the underlying constitutional issue as the Court of Appeals opinion apparently tries to do.

On the constitutional merits, it is essential to begin by carefully and narrowly defining the constitutional issue before this Court. That issue is: Does an unrepresented, indigent defendant who is in jail because he cannot post bond have a constitutional right to be physically present in court at his arraignment if he intends to plead guilty? If so, the case raises a further issue: Does a violation of that constitutional right undermine the reliability of the conviction which derives from that plea?

There has been no dispute in this case as to the existence of a constitutional right on the part of a criminal defendant to be physically present in the courtroom, nor could there be in light of Illinois v. Allen, 397 U.S. 337, 338 (1970), and State v. Divanovic, 200 Wis.2d 210, 219, 220, 546 N.W.2d 501 (Ct. App. 1996), among other cases. It is well-settled, at least since Allen, supra, (at 338), that this right includes "...the right to be present in the courtroom at every stage of his or her trial." (Emphasis Added) Allen, supra, Divanovic, supra, State v. Haste, 175 Wis.2d 1, 22, 500 N.W.2d 678 (Ct. App. 1993); State v. Haynes, 118 Wis.2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984). There is absolutely no factual dispute on this point: Mr. Peters was in the Shawano County jail at all times during his arraignment, plea and sentence; he was never "in the courtroom".

Second, it is equally well-established that this constitutional right includes the right to be present "...at proceedings before trial at which important steps in a criminal prosecution are often taken." Leroux v. State, 58 Wis.2d 671, 689, 207 N.W.2d 589 (1973) and cases there cited. A misdemeanor arraignment at which the entire criminal matter may be completely resolved, as in fact happened in this case, is quite obviously

a "proceeding before trial at which important steps in a criminal prosecution are often taken."

The lower courts did not dispute this analysis but concluded that although such a constitutional right does exist, it does not apply to the guilty plea hearing at issue in this case. The Court of Appeals majority concluded that there was no constitutional violation in the absence of a specific showing of unfairness on the facts of the individual case (App.--paragraphs 10-13). Judge Hoover, in his concurrence, emphasizes this as the nature of the holding, although he also takes pains to note that it is not hard to conceive that a pro se incarcerated defendant could find being in a room in the jail with only corrections staff present a coercive environment in which to enter an inculpatory plea (App. 117). The Court of Appeals thus apparently ruled that a criminal defendant must show that his plea was not knowingly, intelligently and voluntarily entered in order to establish a violation of his due process constitutional right to be physically present in the courtroom for his plea proceeding. The majority opinion underscores this conclusion by distinguishing this case from State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992) on the basis that Baker had shown a violation of Sec. 971.08 Stats. whereas Mr. Peters did not (App. 113--paragraph 9). As the Court of Appeals acknowledged, Sec. 971.08 Stats. was enacted to implement the requirement that a guilty plea be knowingly, intelligently and voluntarily entered (App. 113--paragraph 9). Of course, it is a violation of constitutional due process to accept a guilty plea which is not knowingly, voluntarily and intelligently entered regardless of where a criminal defendant is physically located when he enters that plea and regardless of whether or not

that defendant has a constitutional due process right to be present in court (Boykin v. Alabama, 395 U.S. 238 (1969). The rationale of the Court of Appeals in this case would therefore make the constitutional due process right to be present in court redundant and hence mere constitutional surplusage, at least in the context of a guilty plea proceeding. Whether a court is construing a constitutional provision Milwaukee Metropolitan Sewerage District v. D.N.R., 122 Wis.2d 330, 336, 362 N.W.2d 158 (Ct. App. 1984, a statute Kett v. Community Credit Plan, Inc., 228 Wis.2d 1, 14, 596 N.W.2d 786 (Ct. App. 1999 or a contract Estate of Thompson v. Jump River Electric Co-operative, 225 Wis.2d 588, 600, 593 N.W.2d 901 (Ct. App. 1999), it is a cardinal rule of construction that the language of the constitutional provision, statute or contract will be construed in such a way that no word or clause is rendered and so that every word, if possible, is given effect. A construction which renders any word or phrase mere surplusage is to be strictly avoided (Id.). To construe the constitutional due process guarantee of a defendant's right to be physically present in court as the Court of Appeals did is to render the entire guarantee mere constitutional surplusage in the context of a guilty plea proceeding. This is a construction which should be strictly avoided.

The construction adopted by the Court of Appeals in this case also fails to square with the language of the guarantee itself. That language, as repeated in Divanovic, supra at 219-220, contains no exceptions. It does not exclude misdemeanor cases while including felonies. Nor does it exclude cases in which a guilty plea is entered while including cases which are tried to a jury or to the court. It includes all criminal cases. This right is clear and without exception (Id.).

Sec. 967.08(2)(d) Stats. allows courts to conduct arraignments as telephone proceedings only if the defendant intends to plead not guilty or refuse to plead. Sec. 967.08 contains no provision allowing a court to conduct an arraignment as a telephone proceeding if the defendant intends to plead guilty. This statutory distinction coincides exactly with the scope of the constitutional right to be physically present in the courtroom as it has been defined above. An arraignment at which a defendant pleads not guilty or refuses to plead is basically a necessary formality in order to begin the process of getting the case ready for trial. It is not a "proceeding before trial at which important steps in a criminal prosecution are often taken." An arraignment which results in a guilty plea, on the other hand, is just such a proceeding because it results in a final determination of the guilt or innocence of the defendant. Therefore, the constitutional guarantee does not apply to the former situation but is fully applicable to the latter situation. The phrasing of Sec. 967.08(2)(d) Stats. clearly recognizes this fact. The constitutional right to be physically present in the courtroom was fully applicable to the guilty plea hearing at issue in this case.

Further, this case involves a constitutional violation legally indistinguishable from the violation involved in Baker, supra. A guilty plea accepted in violation of constitutional requirements raises doubts about the reliability of the conviction and that such a violation will provide a basis for a later collateral challenge. Baker, supra. To meet constitutional requirements, the plea must be knowingly, voluntarily and intelligently entered. Baker, supra at 71. Miranda v. Arizona, 384 U.S. 436 (1966) presumes that custodial interrogation at a police station or jail is inherently coercive.

State v. Kiekhefer, 212 Wis.2d 460, 469, 569 N.W.2d 316 (Ct. App. 1997). The plea hearing in this case was a "custodial plea hearing" which took place under custodial circumstances similar to those presumed to be inherently coercive in Miranda, supra. The atmosphere in which the plea hearing took place in this case was a "police dominated one" (State v. Armstrong, 223 Wis.2d 331, 349, 588 N.W.2d 606 (1999), as was the atmosphere in which the interrogation took place in Miranda, supra. As noted in Armstrong, supra at page 352, law enforcement officers conducting a custodial interrogation such as the one in Miranda, supra must employ procedural safeguards sufficient to protect a defendant's Fifth Amendment and Fourteenth Amendment rights. Those safeguards are the so-called "Miranda warnings". A "custodial arraignment" such as the one in this case is just as inherently coercive and the same necessity exists for procedural safeguards to protect a defendant's Fifth Amendment and Fourteenth Amendment rights. In the case of a plea hearing, those procedural safeguards take the form of the constitutional right to be physically present in court "at all stages of a trial" as that term of art has been defined in the case law cited above. The absence of those procedural safeguards affects the voluntariness of the plea. Such a violation supported a collateral challenge in Baker, supra and will support a collateral challenge in this case as well.

The factual situation in this case underscores the validity of this conclusion. Mr. Peters was an unrepresented defendant who had remained in jail since his arrest due to his inability to post bond. If he pled "not guilty" he faced the prospect of remaining in jail until his trial some time in the relatively distant future. Furthermore, he did not

leave the coercive atmosphere of the Shawano County jail even for his plea hearing; he was asked to enter a plea in a small room in the jail, entirely alone but for jail staff, with the court and prosecutor appearing before him only on a television screen. In this situation, a completely innocent man could well decide to plead guilty to the relatively minor offense then charged against Mr. Peters because that was the fastest way to get out of jail. The voluntariness of any guilty plea made under these circumstances is questionable at best.

The Court of Appeals analogy to the use of closed circuit television in the fields of commerce and politics (App. 115--Paragraph 13, n.12) is totally inapposite. In those situations, there is a rough equality in the positions of the parties. This case, on the other hand, is marked by the inequality in the positions of the parties. An indigent unrepresented criminal defendant who has remained in jail since his arrest because of his inability to make bond has very few, in any, resources available to aid him in making his decision to plead guilty or not guilty, particularly when he is forced to do so without ever leaving the coercive environment of jail. The state retains its full and vast panoply of resources. There is no similar situation in the fields of commerce, politics and education. It is this huge inequality which the constitutional right to be physically present in court seeks to ameliorate by physically removing a criminal defendant from the highly coercive environment of jail and transporting him to the much less coercive environment of a public courtroom in order to enter his plea. By requiring a showing that the plea was not knowingly, voluntarily and intelligently entered in order to establish a violation of a criminal defendant's constitutional right to be physically present in the

courtroom at a guilty plea hearing, the Court of Appeals has totally ignored this vast inequality in the respective positions of the state and Mr. Peters. In so doing, it has rendered the constitutional right to be present in the courtroom during a guilty plea proceeding redundant and mere constitutional surplusage. This it should have not have done.

Mr. Peters had a constitutional right to be physically present in court at the plea hearing on April 4, 1996. That right was violated. The only remaining question is whether that violation affects the reliability of the resulting conviction. Baker, supra establishes that anything which adversely affects the voluntariness of a guilty plea also adversely affects the reliability of the conviction stemming from that plea. As outlined above, the circumstances under which the guilty plea was taken on April 4, 1996 clearly had an adverse affect on the voluntariness of that guilty plea. They thus had an adverse effect on the reliability of the conviction which resulted from that plea as well. Mr. Peters' collateral challenge to the use of this conviction for penalty enhancement purposes should have been sustained by the trial court.

CONCLUSION

Based upon the legal theories and authorities presented herein, Mr. Peters asks this court to grant his petition for review and to reverse the judgment and sentence entered below and to remand the matter to the trial court for resentencing on the offense of operating a motor vehicle after revocation, fourth offense.

Dated at Oconto Falls, Wisconsin this 19th day of May, 2000.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.62 for a petition for review produced with a monospaced font. The length of this petition is 15 pages.

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