

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

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 No. 2011AP2687-CR

Cir. Ct. No. 2008CM634

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DRAGISA PAVLOVIC,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 REILLY, J.¹ Dragisa Pavlovic appeals from judgments of conviction and an order denying his motion for postconviction relief. Pavlovic

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

was convicted by a jury of two counts of knowingly violating a domestic abuse restraining order, WIS. STAT. § 813.12(8), and three counts of bail jumping, WIS. STAT. § 946.49(1)(a). Postconviction, Pavlovic moved for dismissal of some counts and a new trial on others. The trial court denied his motion. On appeal, Pavlovic contends that he did not knowingly, intelligently, and voluntarily waive his right to counsel, that he was not competent to represent himself, and that he was denied his right to a speedy trial. We affirm on all counts.

¶2 While subject to a domestic abuse restraining order, Pavlovic was charged, in a case other than the one on appeal, with battery. He was released on bond and went to his wife's house, had contact with her, and later contacted her through a third party. Pavlovic was charged with two counts of knowingly violating a domestic abuse restraining order and three counts of bail jumping.

¶3 At the final pretrial conference, Pavlovic's attorney informed the trial court that Pavlovic wanted to proceed pro se. The trial court questioned Pavlovic about his decision, discussed the difficulties and responsibilities of trying a case, and confirmed with Pavlovic that he understood he was entitled to an attorney and could have one appointed if he could not afford one. The trial court decided to leave the case set for trial and directed Pavlovic to review the waiver of attorney form with his attorney and sign it if he wanted to go ahead without a lawyer.

¶4 On the day of trial, Pavlovic confirmed his decision to proceed without counsel. The trial court again informed Pavlovic that he had the right to a lawyer, and if he could not afford one, a public defender would represent him. Pavlovic said that he had let his previous attorney go because he could not afford to pay the fee for the jury trial. The trial court asked Pavlovic about his

employment, learned that he made \$42.05 per hour as a pipefitter, and concluded that it was unlikely he would qualify for a public defender. The trial court again told Pavlovic of the difficulties of presenting the case to a jury and cautioned him that there are technical rules in law. The trial court went over the charges of knowingly violating a domestic abuse restraining order and bail jumping, the burden of proof, and Pavlovic's right to testify. The trial court found that Pavlovic understood his right to counsel and had waived it. The case proceeded to trial, with Pavlovic representing himself, and the jury found him guilty on all counts.

¶5 On appeal, Pavlovic contends that he was unconstitutionally denied his right to counsel and his right to a speedy trial. We address each in turn.

Right to Counsel

¶6 A criminal defendant's right to counsel includes the right to proceed without counsel. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). When a defendant decides to proceed pro se, the trial court must ensure that he or she (1) has knowingly, intelligently, and voluntarily waived the right to counsel and (2) is competent to proceed without counsel. *Id.* We review de novo whether a waiver of the right to counsel was knowing, intelligent, and voluntary. *Id.* at 204. We uphold the trial court's determination of competency to proceed pro se unless it is unsupported by the facts. *Pickens v. State*, 96 Wis. 2d 549, 570, 292 N.W.2d 601 (1980), *overruled in part on other grounds by Klessig*, 211 Wis. 2d at 206, 212.

¶7 Under *Klessig*, the trial court must conduct a colloquy with the defendant to determine if he or she knowingly, intelligently, and voluntarily waives his or her right to counsel. *Klessig*, 211 Wis. 2d at 206. The trial court must ensure that the defendant: (1) made a deliberate choice to proceed without

counsel, (2) is aware of the difficulties and disadvantages of proceeding pro se, (3) is aware of the seriousness of the charges against him or her, and (4) is aware of the general range of possible penalties. *Id.* If the defendant moves for postconviction relief based on an inadequate colloquy, he or she must make a prima facie showing that the colloquy was deficient. *See State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes such a showing, the trial court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary. *Klessig*, 211 Wis. 2d at 206-07. The State must prove by clear and convincing evidence that the waiver of counsel was knowing, intelligent, and voluntary. *Id.* at 207.

¶8 As a precautionary measure, the trial court granted Pavlovic a *Klessig* evidentiary hearing. We conclude the trial court's waiver colloquy complied with *Klessig*. First, the trial court established that Pavlovic made a deliberate choice to proceed pro se. The trial court confirmed that Pavlovic understood that he was entitled to a lawyer. The trial court asked Pavlovic about his income and discovered that Pavlovic had earned over \$80,000 in the previous year. The trial court found that Pavlovic understood his right to counsel and that he could have hired a lawyer, but that he chose not to do so.

¶9 Second, the trial court advised Pavlovic of the difficulties and disadvantages of proceeding pro se. The trial court told Pavlovic that trying a case is more difficult than it may seem and that it is not like television. The trial court told Pavlovic that a nonlawyer trying his own case is like a person performing surgery on himself. The trial court warned Pavlovic that if his unfamiliarity with procedure caused a mistrial, he himself would bear responsibility for it. After these warnings, Pavlovic indicated that he was ready for trial.

¶10 Third, the trial court informed Pavlovic of the seriousness of the charges against him. The trial court went through the State's charges with Pavlovic prior to trial.

¶11 Finally, the trial court informed Pavlovic of the maximum penalties he faced for the charged offenses. After this explanation, Pavlovic reiterated that he wanted to proceed to a jury trial.

¶12 We must also determine if Pavlovic was competent to proceed pro se. In determining competency, the trial court considers a defendant's education, literacy, fluency in English, and any physical or psychological disability the defendant may have. *Id.* at 212. A competency determination should not prevent persons of average ability and intelligence from representing themselves unless a specific problem or disability is identified that would prevent the presentation of a meaningful defense, should one exist. *Id.* The determination of competency rests largely upon the judgment and experience of the trial judge. *Id.* If the trial court does not independently consider competency, the reviewing court may uphold the trial court's decision that the defendant was competent based on the facts in the record. *Id.* at 213.

¶13 The trial court did not make an independent, specific finding of competency, but, based on our review of the facts in the record, we hold that Pavlovic was competent to represent himself. Pavlovic had twelve years of schooling in his native Yugoslavia, and obtained a GED and an HSED. According to the trial court, Pavlovic conducted himself competently in the English language during the trial. Pavlovic had taken some English language classes and studied at home. The trial court found Pavlovic to be very bright and perfectly capable, possessing well above-average intellectual capacity. At the time of trial, Pavlovic

was making \$80,000 a year as a union pipefitter. As noted above, the competency determination should not prevent a person of average or above-average intelligence from trying his or her own case unless some deficiency or disability is shown. *Pickens*, 96 Wis. 2d at 569. The record does not reveal any such deficiency or disability.²

Speedy Trial

¶14 Pavlovic was found guilty on May 6, 2008. The trial court fined him on one bail-jumping count, imposed probation on the two other bail-jumping counts, and withheld sentencing on the two counts for knowingly violating a domestic abuse restraining order. Pavlovic was sentenced on these two pending counts on June 9, 2009.

¶15 Pavlovic asserts that he was denied his right to a speedy sentencing, which is part of the right to a speedy trial. *State v. Allen*, 179 Wis. 2d 67, 73, 505 N.W.2d 801 (Ct. App. 1993). Whether a defendant has been denied the right to a speedy trial is a constitutional question we review de novo. *State v. Leighton*, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. The trial court's underlying findings of historical fact will be upheld unless clearly erroneous. *Id.*

¶16 Wisconsin courts apply a four-part balancing test to a defendant's claim that his or her right to speedy sentencing was violated. We consider the length of the delay between conviction and sentencing, the reason for the delay,

² In his reply brief, Pavlovic argues that the trial court "failed in its continuing responsibility to [e]nsure that [Pavlovic's] complete lack of understanding on how to conduct a defense did not substitute for the State's obligation to prove its case." Pavlovic did not raise this issue in his brief-in-chief and we decline to review it. See *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶34, 296 Wis. 2d 337, 723 N.W.2d 131.

the defendant's assertion of the right to speedy sentencing, and prejudice to the defendant. *See Allen*, 179 Wis. 2d at 74. No single factor is either "necessary or sufficient" to a finding that the defendant's right to speedy sentencing was violated. *See id.* In speedy sentencing cases, unlike speedy trial cases, the prejudice prong dominates the four-part test. *See id.* at 77-78. This is because the "traditional interests that the speedy trial guarantees ... diminish or disappear once there has been a conviction." *Id.* at 78. In fact, "once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice." *Id.* at 77-78 (citation omitted).

¶17 Given the importance of the prejudice prong in speedy sentencing cases, we begin with this part of the test. Pavlovic's argument that he was prejudiced is based on the trial court's decision to delay sentencing until the criminal proceedings in another matter involving Pavlovic concluded. On March 17, 2008, Pavlovic was charged with battery, intimidating a victim/dissuading reporting, and disorderly conduct, stemming from an incident that occurred the previous month. On August 19, 2008, he was also charged with three counts of bail jumping. At a February 2009 pretrial conference on these two matters, Pavlovic requested sentencing on the knowingly violating a domestic abuse restraining order convictions from May 2008. The court stated that it wanted to delay sentencing until it knew the outcome of the other two criminal matters. On June 9, 2009, Pavlovic was convicted on all three counts stemming from the March 17, 2008 incident, and all three bail-jumping counts. Pavlovic was then sentenced on the knowingly violating a domestic abuse restraining order convictions on June 9, 2009.

¶18 Pavlovic argues that he was prejudiced because had he been sentenced immediately, he would not have jumped bail and the court would not have known the outcome of his other criminal cases. He thus asks us to hold the judicial system responsible for his own unlawfulness and for his decision to jump bail—in other words, the court is at fault for not putting him behind bars sooner. We will not address this frivolous argument. As we hold that Pavlovic was not prejudiced, we need not discuss the other three speedy sentencing factors.

By the Court.—Judgments and order affirmed.

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

