

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2003

Cornelia G. Clark
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. 02-3370-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02 CM 1410

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN M. BOON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

¶1 SCHUDSON, J.¹ Kevin M. Boon appeals from a judgment of conviction for battery, in violation of WIS. STAT. § 940.19(1), following a jury trial, and from the order denying his motion for postconviction relief. He argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that because he did not voluntarily waive counsel, his right to the assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution, was violated and, therefore, he was denied due process of law in violation of the Fifth Amendment to the United States Constitution. This court disagrees and, therefore, affirms.

I. BACKGROUND

¶2 Boon was charged with one count of battery in violation of WIS. STAT. § 940.19(1) on February 17, 2002. At the initial appearance the next day, Boon was advised of his right to counsel and the court recommended that he report to the State Public Defender's office. The case was adjourned for a pretrial hearing on March 4, 2002. On March 4, Boon appeared in court and requested additional time to hire an attorney. His request was granted and the case was adjourned until March 18, 2002.

¶3 On March 18, Boon appeared in court with a public defender who acted as a "friend of the court." Boon again requested additional time to hire an attorney. The court granted the request and the pretrial conference was adjourned until April 1, 2002. On April 1, Boon again appeared without an attorney and the court scheduled the case for a status conference on April 17, 2002 and a jury trial on June 6, 2002.

¶4 On April 17, Boon appeared in court without an attorney for the fourth time. He advised the court that he would not divulge his financial information to the Public Defender's office without assistance of counsel. The court passed the case and Boon spoke with a public defender. The case was then recalled, Boon again stated that he would not divulge his financial information, and the court adjourned for another status conference on May 20, 2002.

¶5 On May 20, Boon again appeared in court without counsel. The court again explained to Boon that he needed to fill out the financial documents from the Public Defender's office to obtain representation. The court stated:

All right. This is what I'm going to do for you, Mr. Boon. I will do two things: I will pass the case. I will let you look at the document. You will make a decision whether you want to sign it. If you don't want to sign it, that means you are going to get your own attorney, and I will give you some time to do so.

After a brief adjournment, the case was recalled. Boon notified the court that he was unwilling to sign documents allowing the Public Defender's office access to his financial information. The court advised Boon: "you have to decide ... whether you want a short adjournment to try to get an attorney... [o]r ... whether you want [the court] to make a finding regarding your waiver of your right to have an attorney." Boon informed the court that he needed counsel and stated that he had spoken to at least fifteen different attorneys and was unable to work out an arrangement with any of them. He also stated that the problems he had obtaining representation were not financial. The court inquired as to whether the State would be willing to "vacate" the jury trial. The State opposed any further adjournment of the trial and opined that Boon was simply trying to cause delay. The following colloquy then occurred:

THE COURT: All right ... Mr. Boon, do you have the money to hire an attorney?

BOON: Yes.

THE COURT: And have you been quoted some figures you could meet?

BOON: Yes.

THE COURT: All right. I will give you until the end of the week. Set this matter for Friday.

BOON: Your honor, I'm going out of town on some other matters that I have. Just like I spoke to you before, I will not be back in town until about June 3rd. I'm leaving on Thursday, and I won't be back until June 3rd.

THE COURT: Is this-- What kind of trip is this?

BOON: Personal matters.

THE COURT: Is it vacation?

BOON: Personal matters.

THE COURT: Okay. Mr. Boon, I'm sorry about your personal matters, but the court is going to make a decision today that you are waiving your right to counsel. Based on the entirety of the record, the trial will be on June 6th at 8:30 a.m. Be ready to proceed with or without an attorney. You can go on your vacation, but be ready to go to trial. [82:12-13]

¶6 On June 6, the court mentioned that at the last court date it had determined that Boon forfeited his right to counsel. The court then inquired as to whether Boon had retained counsel since that date. Boon stated that he had not. The court also noted that Boon had filed myriad documents with the court, some that very day. One was a request for removal that had been filed with the United States District Court of the Eastern District of Wisconsin. The court indicated that the removal request did not, however, appear to be complete—it did not have a caption for the plaintiff or the defendant, it lacked a date, and it did not have the chief judge's actual signature. Boon indicated that he had filed the federal document with the circuit court as notification that his case had been moved to federal court. He did not explain why or how his case had been transferred to federal court; he simply told the circuit court that “the documents filed explain the procedure [he] took.” After conferring with the State, the circuit court found that “all the documents the Court has reviewed prior to today's date that was [sic] mentioned of record today are not applicable to these proceedings and the Court is

denying any request based on those documents.” The court adjourned the matter for a new pretrial date to review the documents Boon had filed that very day and advised him to file any additional documents well before the next trial date. The court also suggested that Boon continue to consider his option of retaining counsel. The court set a final pretrial date for July 15, 2003 and a jury trial for September 24, 2003.

¶7 At the July 15 pretrial, the court noted that the federal district court had reviewed and denied Boon’s request for removal and remanded the case to the circuit court. The court then ruled on Boon’s many motions. One pertained to the court assisting him in obtaining counsel. The court ruled that it would not “entertain the specifics of th[e motion] other than saying that the Court ha[d] previously ruled, and [it] reaffirm[ed its] record on the issue of [Boon] waiving [his] right to counsel.” The court then asked Boon if he had anything to add to the motion. He replied: “I’ve never waived my right to counsel. I requested the Court to help me obtain assistance of counsel. I’ve never said, I do not need counsel.” The following colloquy than occurred:

THE COURT: It is clear to me that you want an attorney, but you want it under certain conditions. And as a result of that, you’ve been unable to-- And I think at least fifteen private attorneys you’ve talked to, and it wasn’t for financial reasons. You couldn’t work something out for them to represent you. I talked to you numerous times about your ability to proceed with the public defender’s office as an option. You don’t want to do that. I’m not going to revisit all of that. I’m simply reaffirming my prior decision that by your actions, you waived your right to counsel.

BOON: Before you go on, would you mind explaining something to me? There is a part I’m missing. I never waived my right to counsel. As I said before, I don’t know if there is something I am doing incorrectly, that’s why I requested the Court’s help in helping me find assistance of counsel.

THE COURT: Well, Mr. Boon, I think the record is clear that you have in written form and orally have asked the Court to help you even understand this issue. And I take great pains, Mr. Boon, to make sure that I explain it as clearly as I can. And the bottom line is this: Mr. Boon, and that is, you certainly have the right to have an attorney in this type of case. There is no question about it, but you also must exercise some responsibilities on your end to facilitate getting an attorney.

And clearly, based on this record, you simply have not been willing to compromise some of your strong beliefs, even if they are not based in fact. So you can't get beyond that to really find out from either a private attorney or from the public defender's office what it is going to be like to have an attorney and how they can assist you because you won't allow it to happen. I'm deferring to you on that. I've given you a lot of opportunity. I went through documentation with you. I even maybe indicated to you when [you] see [a] private attorney that you should perhaps be a little more open-minded before you reject an attorney, but I'm not going to spend any more time on that. That's over. Okay.

¶8 On September 20, four days before trial, Boon filed a civil lawsuit in federal court naming Circuit Court Judge Carl Ashley as a defendant. At the September 24 trial, Boon again appeared without counsel. The State expressed its concerns to the court about a conflict arising from the civil suit Boon had filed. The court stated that filing the suit was “a dilatory tactic by Mr. Boon” and that he was “making a mockery out of the criminal court system ... by his insistence on filing voluminous amounts of paperwork, which are not really relevant to these proceedings but rather as a dilatory effort to delay and unreasonably so.” Boon was then tried before a jury and convicted of battery. He was sentenced to four months of confinement, stayed, and placed on two years of probation.

II. DISCUSSION

¶9 Boon’s arguments on appeal, while often convoluted, essentially challenge the circuit court’s ruling that he forfeited his right to counsel by his actions. This court concludes that the ruling was proper.

¶10 Whether Boon was deprived of his constitutional right to counsel is a question of constitutional fact that this court reviews *de novo*. *State v. Coleman*, 2002 WI App 100, ¶10, 253 Wis. 2d 693, 644 N.W.2d 283. “Questions of ‘constitutional fact’ are not actually ‘facts’ in themselves, but are questions which require the ‘application of constitutional principles to the facts as found....’” *Id.* (citation omitted).

¶11 In Wisconsin, a criminal defendant is guaranteed the right to counsel by article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *See id.*, ¶11. “The right to counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law and ultimately that justice is being served.” *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). A defendant may waive his or her right to counsel. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Before accepting waiver, however, the circuit court must ensure that it is knowingly, voluntarily, and intelligently entered and that the defendant is competent to proceed without counsel. *Id.*

¶12 Here, Boon argues, and the State concedes, he did not knowingly and intelligently waive his right to counsel. The record is clear that Boon repeatedly indicated his desire for representation. It is equally clear that Boon, by his conduct, forfeited his right to counsel.

¶13 Certain situations require that “a circuit court ... have the ability to find that a defendant has forfeited his right to counsel.” *State v. Cummings*, 199 Wis. 2d 721, 756, 546 N.W.2d 406 (1996). These situations “most often involv[e] a manipulative or disruptive defendant.” *Id.*, 752 (citation omitted). “In such a situation, a waiver of counsel and the deliberate choice to proceed *pro se* occurs, not by virtue of a defendant’s express verbal consent to such procedure, but rather by operation of law because the defendant was deemed *by his own actions* that the case proceed accordingly.” *Coleman*, 253 Wis. 2d 693, ¶16 (citing *State v. Woods*, 144 Wis. 2d 710, 424 N.W.2d 730 (Ct. App. 1988)).

¶14 In *Woods*, the circuit court required the defendant to proceed *pro se* after he dismissed five different court-appointed attorneys and was “unwilling to proceed with a public defender, but ... also refus[ed] to waive his right to counsel.” *Id.*, 713. Here, the circuit court adjourned Boon’s case several times to give him the opportunity to retain counsel. But Boon refused to cooperate with the Public Defender’s office and, by his own account, after consulting fifteen different private attorneys, was unable to retain representation.² Like the defendant in *Woods*, Boon was “unwilling to proceed with a public defender” and he “refused to waive his right to counsel.” *See id.*

¶15 “The right to counsel cannot be manipulated to obstruct the orderly procedure for trial or to disrupt the administration of justice.” *Coleman*, 253 Wis. 2d 693, ¶17. “The triggering event for forfeiture is when the ‘court becomes

² In his brief-in-chief, Boon contends “[h]e was utterly without adequate funds with which he could obtain counsel” and he was “denied assistance from the Public Defender’s office.” The record reveals, however, that Boon informed the court that finances were not an issue in seeking representation and that his failure to cooperate with the procedures established by the Public Defender’s office resulted in his denial of court-appointed assistance.

convinced that the orderly and efficient progression of the case [is] being frustrated....” *Cummings*, 199 Wis. 2d 721, 753 n.15 (citation omitted). To determine whether a defendant has forfeited his or her right to counsel, it is recommended that circuit courts:

- (1) [provide] explicit warnings, that, if the defendant persists in [specific conduct], the court will find that the right to counsel has been forfeited...;
- (2) [engage in] a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;
- (3) [make] a clear ruling when the court deems the right to counsel to have been forfeited; and
- (4) [make] factual findings to support the court’s ruling....

Coleman, 253 Wis. 2d 693, ¶22 (citing *Cummings*, 199 Wis. 2d 721, 756 n.18).

¶16 Here, at the May 20 status conference, after determining that Boon would not cooperate with the Public Defender’s office and that he could afford a private attorney, the circuit court gave Boon two options before finding that he forfeited his right to counsel: (1) take “a short adjournment to try to get an attorney,” or (2) permit the court to “make a finding regarding [his] waiver of [his] right to have an attorney.” Boon informed the court that he needed representation and the court, therefore, offered to adjourn the case again. In an apparent attempt to cause further delay, Boon indicated that he would be out of town and would not be able to proceed as the court suggested. Thus, having already warned Boon, the court found that, by his actions, he waived his right to counsel and stressed that he must be prepared to try the case with or without an attorney. Moreover, the court told Boon that he “certainly ha[d] the right to an attorney” but that he “also must exercise some responsibilities ... to facilitate getting an attorney.”

¶17 Boon appeared in court on eight separate dates before trial. He repeatedly made it clear that he understood the benefits of having counsel and that he desired counsel, yet he continued to maintain that he could not reach an agreement with a suitable attorney. The record, Boon’s refusal to hire an attorney, his filing of voluminous paperwork, his attempt to have his case removed to federal court, and his civil suit against Judge Ashley support the court’s finding that Boon’s moves were manipulative efforts to delay his case from going to trial. Clearly the shot clock ran out; the circuit court did not err in ruling that Boon had forfeited his right to counsel.

¶18 On appeal, Boon additionally argues that Judge Ashley was prohibited from presiding over his trial, pursuant to WIS. STAT. § 757.19, because of the federal civil lawsuit filed against him. Boon’s argument is unclear and unsupported; thus, this court need not address it. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not address “amorphous and insufficiently developed” arguments). Boon also argues that by failing to respond to the “True Bill,”³ the State’s witnesses “admitted and confessed” to all matters and were, therefore, bound to its facts. Again, his argument is amorphous and insufficiently developed. *See id.*

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

³ Boon served each of the State’s witnesses with a “True Bill,” a list of statements and/or confessions that he expected each witness to sign and have notarized.

