COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1423 **Cir. Ct. No. 2002CF1089**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. ADELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges. *Affirmed.*

Before Wedemeyer,[1] Fine and Kessler, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Mark A. Adell appeals from a judgment of conviction for three burglaries, and from a postconviction order summarily denying his motion for resentencing.[2] We conclude that Adell validly waived his right to counsel and was competent to proceed *pro se* at sentencing; consequently, resentencing is unnecessary. Therefore, we affirm.

¶2 A jury found Adell guilty of three counts of burglary, each as a habitual criminal. The trial court imposed a thirty-two-year aggregate sentence, comprised of twenty-two- and ten-year respective aggregate periods of initial confinement and extended supervision. Adell filed a postconviction motion for resentencing, alleging that he was sentenced on inaccurate information, that he should have been declared eligible for the Earned Release Program, and that the trial court erred in discharging trial counsel before sentencing without good cause. The trial court summarily denied the motion.

¶3 Adell appeals, pursuing the issue regarding the propriety of discharging counsel before sentencing, and seeking resentencing before the same trial court judge who sentenced him. We conclude that Adell validly waived his right to counsel and elected to proceed immediately thereafter to sentencing; he further demonstrated his competence to represent himself, as he assured the trial court that he wanted to do. Consequently, the trial court did not err in discharging trial counsel and indulging Adell his considered desire to proceed *pro se* without

[2] This case was assigned to the Honorable John A. Franke who entered the judgment of conviction and presided over the sentencing hearing that is the subject of Adell's appellate challenges. The Honorable Dennis P. Moroney entered the postconviction order summarily denying his resentencing motion.

an adjournment to further prepare or to obtain new counsel. Therefore, the record does not warrant resentencing.

¶4 A criminal defendant has the constitutional right to represent himself. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7.

> The Supreme Court has recognized that the right to represent oneself seems to conflict with the right to the assistance of counsel. This court has also noted that the interaction of these two rights "create[s] somewhat of a dilemma for the trial judge who is confronted with the unusual defendant who desires to conduct his own defense." When a defendant seeks to proceed *pro se*, the [trial] court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed *pro se*. If these conditions are not satisfied, the [trial] court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel. However, *if the defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the [trial] court must allow him to do so or deprive him of his right to represent himself*.

State v. Klessig, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997) (citations omitted; second set of brackets and emphasis added).

> In making a determination on a defendant's competency to represent himself, the [trial] court should consider factors such as "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." The … competency determination should not prevent persons of average ability and intelligence from representing themselves unless "a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist." This court further stated that this determination must rest to a large extent upon the judgment and experience of the trial judge.

Id. at 212 (citations omitted).

¶5 At the outset of the scheduled sentencing hearing, the trial court had two motions pending: defense counsel Thomas K. Hackbart's motion to withdraw, and Adell's letter-motion seeking Hackbart's withdrawal. Hackbart explained that, despite hours of preparation and conferring with Adell, there was insufficient "time for me to do what he [Adell] wanted me to do." Hackbart "[did not] know if they're realistic demands or not. He [Adell] thinks that they certainly are." The trial court heard from Adell on the status of his relationship with Hackbart and explained that "[i]t [wa]s not unusual for defendants and their attorneys to have disagreements, and problems, and struggles, and conflicts and arguments." When asked directly by the trial court about his position, Adell clearly stated that he wanted to proceed to sentencing that day, but was "also concerned with whether or not [Hackbart wa]s prepared." The trial court then explained Adell's options, namely that he could proceed to sentencing that day, or that Hackbart's withdrawal motion would be granted "and that you [Adell] get a different attorney." The trial court then gave Hackbart and Adell an opportunity to confer before continuing.

¶6 The trial court then explained that being prepared for sentencing was "a relative concept," and that the trial court sought to avoid proceeding to sentencing "and then in the middle of sentencing say that you want an adjournment because some records aren't here." The trial court extensively explained to Adell his options to proceed that day, represented or unrepresented, or to adjourn the sentencing. It inquired of Hackbart about his readiness to proceed to sentencing, and Hackbart summarized his position as follows:

> Judge, be it my fault or Mr. Adell's, I went in the back and talked to Mr. Adell, and he brought up about a dozen points that I was not prepared in his eyes and I don't see how I can adequately proceed.

> ….
>
> I don't see how I adequately can proceed in his eyes.
>
> I am still moving to withdraw.
>
> ….
>
> I still claim that there is [a] complete communications breakdown, be it my fault or not, in his eyes. He indicates that I haven't responded adequately, that I haven't seen him.
>
> I indicated, I saw him on the 4th, and last Monday. As of our meeting last Monday, I believe there was a breakdown.
>
> I indicated we spend time going through my entire file.
>
> I gave him copies of whatever he needed copies of, if I had duplicates, I game him copies of stuff today.
>
> I was under the impression today that I move to withdraw, and (shakes head left to right) I am not adequately prepared to do a sentencing. I know --
>
> ….
>
> And the [next] time I found out I, Mr. Adell -- I moved to withdraw, and he indicated that there was all this information I was supposed to get.
>
> I haven't gotten all the information in his eyes, and I think if I proceed today, we are going to have all kinds of problems with it, regardless of what happens to him.
>
> He is looking at a significant amount of time. It is a very, extremely serious case and I don't see how I can do an adequate job today.

The trial court ultimately granted Hackbart's motion to withdraw. The trial court then proceeded to hear from the victim who was prepared to address the court because she would be moving out-of-state within the next three weeks.

¶7 After the trial court granted Hackbart's motion to withdraw, it asked Adell whether he "want[ed] to say [something] before we set a status date, before we get a new attorney here?" Adell insisted that he wanted to proceed to sentencing that day, telling the trial court that:

> The thing was, I requested to proceed *pro se* and I was hoping that you would attempt to qualify me, and then I would ask that we proceed today so that -- so that the victim, I did say at the beginning that it wasn't fair that, you know, just what she said was exactly what I was saying, there should be some closure.
>
> I am trying to get closure myself, so I would prefer if you could attempt to qualify me to represent myself, and then we could proceed today since I am the person that appears to know everything, or being accused of knowing everything I know what I know, I know more than Mr. Hackbart does in terms of the facts, he knows more about the law but I know the facts of my case, I can set out the particular circumstances I think mitigate the charge, and then the victim can have her opportunity to see this case closed today and that's exactly what I want now.
>
> I didn't come here to bicker, I came to be sentenced today.

¶8 Hackbart was Adell's third lawyer. The trial court had afforded Adell several opportunities to meet with Hackbart to attempt to reconcile their differences, and had extensively explained to Adell the obligations and risks of self-representation, affording examples of what could go wrong if he elected to represent himself at sentencing. Ultimately, it granted Hackbart's withdrawal motion, and began to "get a new attorney here." Adell, however, did not want "a new attorney," despite the trial court's willingness to appoint one. The trial court, knowing that it could not appoint successor counsel who was prepared to proceed to sentencing on that day, ultimately asked Adell whether "it is your wish to proceed today, to represent yourself at the sentencing hearing?" Adell responded,

"[y]es, it is." Adell knowingly, intelligently and voluntarily waived his right to counsel.

¶9 The trial court then inquired into Adell's competence to proceed *pro se*. The trial court was aware of Adell's "long history of criminal violations." The trial court later said at sentencing, when describing Adell's criminal history that "it would appear that Mr. Adell has been in and out of prison for burglary on roughly five or six occasions." The trial court then asked Adell if he had ever proceeded *pro se* before. Adell told the trial court that he had in a prior civil court proceeding. The trial court engaged in a lengthy, comprehensive colloquy with Adell addressing the obligations of a lawyer to ensure that Adell understood what he was waiving by proceeding without counsel. It then explained the maximum potential penalties he was facing, and explained the new bifurcated sentencing structure and how it differed from the sentencing structure that was in effect at the time of his prior offenses. The trial court repeatedly asked Adell if he wanted to waive his right to be represented by an attorney and proceed to represent himself at sentencing, and Adell repeatedly responded that he "would like to waive that right," and that he was "prepared to accept the consequences, the outcome of this case, to move forward on it." Despite the trial court's willingness to appoint another lawyer to represent him at sentencing, Adell repeatedly elected to waive his right to counsel. Adell asked for "[j]ust a few minutes …. to get [his] papers in order;" the trial court granted Adell a recess. The record satisfies us that the trial court carefully and properly assessed Adell's competence to proceed *pro se*.

¶10 We independently conclude that Adell validly waived his right to counsel. The trial court conducted several extensive colloquies with Adell who urged the trial court to allow him to proceed *pro se*, and demonstrated his competence to do so. Consequently, resentencing is not warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).