COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2342-CR **Cir. Ct. No. 2005CF2432**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWIGHT GLEN JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and DENNIS P. MORONEY, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Dwight Glen Jones appeals from a judgment of conviction and from an order denying his postconviction motion seeking a new trial. Jones, who is hearing-impaired, asserts that he was unable to communicate

with his trial attorney. He seeks a new trial, conducted with the assistance of substitute counsel. We reject his contentions and affirm.

BACKGROUND

¶2 This matter returns after remand. Our earlier decision reversed the trial court's order that denied Jones a new trial without an evidentiary hearing. ***State v. Jones***, 2007 WI App 248, 306 Wis. 2d 340, 742 N.W.2d 341 (***Jones I***).[1] We mandated a hearing to determine if "there was a substantial breakdown in communications between Jones and his lawyer." ***Id.***, ¶19.

¶3 ***Jones I*** contains a review of the pertinent facts preceding Jones's conviction. We include here a brief summary of those facts, supplemented with information developed after remand.

¶4 According to Jones, he has no hearing in his right ear, and he has twenty-five percent hearing in his left ear. He wears hearing aids that do not allow him to hear normally. He knows sign language, he can read lips, and he can speak aloud in English. After Jones was charged with multiple crimes, the Wisconsin State Public Defender appointed him an attorney who did not know any sign language.

¶5 Jones was dissatisfied with his appointed counsel and he wrote letters to his counsel, to the public defender's office, and to the trial court seeking

[1] The Honorable Elsa C. Lamelas presided over the pretrial and trial proceedings and the postconviction proceedings reviewed in ***State v. Jones***, 2007 WI App 248, 306 Wis. 2d 340, 742 N.W.2d 341 (***Jones I***). As we did in ***Jones I***, we refer to Judge Lamelas as the trial court. The Honorable Dennis P. Moroney presided over the proceedings after remand. We refer to Judge Moroney as the circuit court.

new counsel. Jones accused his counsel of lying to him and Jones asserted that his counsel failed to meet with him or respond to his concerns. Jones did not state in his letters, however, that he was unable to communicate with his counsel, nor did he request a sign-language interpreter.

¶6 Trial counsel responded to Jones's complaints by moving to withdraw from the case. The trial court denied the motion, concluding that Jones had not established a basis for new counsel and further concluding that involving a new attorney would unnecessarily delay the trial. After a jury convicted Jones of seven offenses, Jones filed a postconviction motion seeking a new trial. He asserted that he could not communicate with his trial counsel and that the trial court erred by failing to appoint substitute counsel. The trial court denied the motion without a hearing, and Jones appealed. We reversed the postconviction order and remanded the matter for an evidentiary hearing where Jones would have the opportunity to prove "by expert testimony if necessary, his contention that he had an irresolvable breakdown in communications with his trial lawyer." ***Id.***

¶7 Several witnesses testified at the hearing after remand. Dr. Amy Otis-Wilbourn, a professor in the Department of Exceptional Education at the University of Wisconsin–Milwaukee, testified regarding her evaluation of Jones's ability to communicate using sign language, English, and speech reading.[2] Jones's trial counsel described communicating with Jones during attorney/client conferences without a sign language interpreter. Jones's mother testified that she

[2] Dr. Otis-Wilbourn explained that the terms "speech reading" and "lip reading" are used to refer to the same process but that "speech reading" is the more current term. Jones used the term "lip reading" in his postconviction affidavit and testimony.

does not know sign language and that she communicates with Jones using spoken English.

¶8 Jones also testified. He asserted that he had difficulty understanding his trial counsel, and that he "couldn't trust [counsel] when [counsel] was talking ... without an interpreter." Jones explained that none of his fifteen letters to trial counsel mentioned either an inability to understand his counsel or a need for an interpreter because his counsel promised to bring an interpreter to future meetings. Jones also explained that his letters to the trial court requesting new counsel did not mention the need for an interpreter because the court knew that Jones was deaf and "would know that [Jones] would have problems with this lawyer without an interpreter."

¶9 The circuit court concluded that Jones failed to prove a substantial breakdown in communication with his trial counsel. The court therefore denied Jones a new trial, and this appeal followed.

DISCUSSION

¶10 "Whether [trial] counsel should be relieved and a new attorney appointed in his or her place is a matter within the trial court's discretion." ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). Among the factors that the court must consider is whether the defendant is able to communicate with trial counsel. *See* ***id.*** "[T]he indigent defendant *is* entitled to a lawyer with whom he or she can communicate.... The ability-to-communicate assessment is left to the reasoned discretion of the trial court." ***Jones I***, 306 Wis. 2d 340, ¶13 (citations omitted) (emphasis in original). We will uphold a discretionary decision if the court below interpreted the facts, applied the proper legal standard to the relevant

facts, and used a rational process to reach a reasonable conclusion. ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999).

¶11 Jones argues that the circuit court erroneously exercised its discretion in concluding that Jones and his counsel could communicate effectively because the court based its conclusion on a factual error, namely, that Jones did not complain about communication problems with his trial counsel until after he was convicted. The circuit court stated: "lack of understanding, lack of sign [language]. Those weren't brought forward to the Court." We observed in ***Jones I***, however, that "at the hearing on the lawyer's motion to withdraw ... [Jones] *did* tell the trial court that he and his lawyer 'did struggle' in attempting to talk to one another, saying: 'I think I need an interpreter with my attorney.'" ***Jones I***, 306 Wis. 2d 340, ¶15 (emphasis in original). Nonetheless, we are obliged to uphold a discretionary determination if we can independently conclude that the facts of record, applied to the proper legal standards, support the circuit court's decision. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993). We look for reasons to sustain a circuit court's discretionary determination. ***State v. Zanelli***, 223 Wis. 2d 545, 563, 589 N.W.2d 687 (Ct. App. 1998).

¶12 The record amply supports the circuit court's conclusions that Jones and his trial counsel communicated effectively without a sign language interpreter. Jones's trial counsel testified that when he and Jones spoke face to face, Jones understood the conversation. Trial counsel explained that Jones expressed himself verbally and that Jones gave responsive answers when counsel asked questions and requested information. Trial counsel also explained that he and Jones did not "see[] things the same way" when they discussed the State's offer of a plea agreement and Jones's chances of prevailing at trial. Trial counsel testified that Jones was "able to be quite adamant about his account of how things went."

¶13 Jones testified that he did not understand his trial attorney. The circuit court did not believe this testimony, finding that Jones was not truthful. The circuit court determined that Jones misrepresented various facts during his pursuit of substitute counsel, understating both the number of times that he met with his attorney and the duration of the meetings. This court defers to the circuit court's assessment of credibility. ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶14 Jones acknowledges that this court must accept the circuit court's credibility assessment, but he suggests that his lack of credibility is not a relevant factor in this case. He states that his letters to his trial counsel constitute "direct documentary evidence" of a substantial breakdown in attorney/client communication. He acknowledges that the letters fail to state "I do not understand." He dismisses the lack of such direct assertions as nothing more than an absence of unnecessary "magic words." He selects various phrases from his letters, such as accusations that his lawyer lied to him, and he explains why these phrases should be construed as statements that he did not understand his lawyer and needed an interpreter. He concludes that his letters, as construed, prove that he could not communicate with his attorney. We must reject these arguments.

¶15 The circuit court expressly considered Jones's letters in light of Jones's testimony. Jones testified that his letters did not include a request for an interpreter. Jones also testified that when he does not understand another person, he usually says "I don't understand." The circuit court concluded:

> It is clear from the record, at least from [Jones's] testimony, that when he does not understand something, he will speak up and say it. That's not been shown to be the case in this case, however. In every one of his letters, there is no mention of his lack of understanding.

¶16 When a written document must be interpreted with the aid of extrinsic evidence, "the question is one of fact, and this court will not disturb the [circuit] court's findings unless they are against the great weight and clear preponderance of the evidence."[3] ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979) (citations omitted) (discussing contract interpretation). In this case, the circuit court interpreted Jones's letters with the aid of Jones's testimony and concluded that the letters do not include complaints about a language barrier or state that Jones could not understand his lawyer. The circuit court's findings are supported by the evidence and we will not disturb them.

¶17 Jones next argues that the conclusions of his expert witness prove his inability to communicate with trial counsel, rendering irrelevant his own lack of credibility on this issue. The expert testified that Jones was unable to understand oral communication without aids such as sign language, gestures, and diagrams. The circuit court was not required to accept that testimony. A circuit court is at liberty when resolving a disputed issue "'to accept or reject the testimony of any expert, including accepting only parts of an expert's testimony; and to consider all of the non-expert testimony ….'" *See* ***State v. Kienitz***, 227 Wis. 2d 423, 441, 597 N.W.2d 712 (1999) (citation omitted).

¶18 In this case, the non-expert evidence suggested that Jones did not need sign language for effective communication. Jones's mother testified that she uses spoken English to communicate with Jones because she does not know sign language. Jones himself testified that he sought and received help from other

[3] The "great weight and clear preponderance" test is essentially the same as the "clearly erroneous" standard of review. ***State v. Hambly***, 2008 WI 10, ¶16 n.7, 307 Wis. 2d 98, 745 N.W.2d 48.

inmates in drafting letters about his case and that none of those inmates knew sign language.

¶19 Further, the record raises questions about other conclusions reached by the expert. Jones's acknowledgment that he has pled guilty more than eight times undermines the expert's determination that Jones did not understand "specialized legal vocabulary" such as "plea," "conviction," "defendant," and "incarceration." Indeed, the expert's testimony that Jones "did not know what incarceration was, either in print or otherwise," appears at odds with Jones's pretrial letter to the court stating that his trial counsel "never done anything for me since I being incarcerated and he only came to visit me but one time out of 6-month .... [Counsel] only responed [sic] to me 2-time since I being incarcerated for 6 1/2 month now." (Spelling and grammar as in original.) The expert conceded that she had no way to determine whether Jones's responses to her testing instruments reflected malingering. In sum, the record supports the circuit court's implicit rejection of the expert's conclusions. *See* ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260 (we accept implicit findings that are supported by the record).

¶20 The evidence and reasonable inferences from the evidence support the circuit court's conclusions that Jones understood the complexities of the case and "discussed [them] with [counsel]. He just didn't like what [counsel] had to say." Therefore, we must accept those conclusions. *See* ***State v. Jenkins***, 2007 WI 96, ¶46, 303 Wis. 2d 157, 736 N.W.2d 24. Because Jones failed to prove a substantial breakdown in communication with his attorney, he is not entitled to a new trial. *See* ***Jones I***, 306 Wis. 2d 340, ¶19 (mandating a new trial in the instant case only upon proof of a substantial breakdown in communication between Jones and his attorney).

¶21 Jones additionally contends that the circuit court's order denying him substitute counsel violated his constitutional right to counsel of choice. Indigents represented by appointed counsel do not have the right to choose their attorneys. *See* ***Jones I***, 306 Wis. 2d 340, ¶13. This court is not free to disregard established Wisconsin precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We address this argument no further.[4]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[4] Appellate counsel states that the argument is raised in order to preserve it for possible supreme court review.