COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
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. 2009AP752-CR **Cir. Ct. No. 2008CM159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE M. LAUTENBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: D.T. EHLERS, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Wayne Lautenbach appeals a judgment of conviction for battery and disorderly conduct. He argues he was not competent to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

proceed pro se at trial. Lautenbach further contends he was denied his constitutional right to present a defense because the circuit court precluded him from calling two witnesses at trial, and because he was not competent to proceed pro se. We reject Lautenbach's arguments and affirm.

BACKGROUND

¶2 After he was charged with the two misdemeanors, Lautenbach had his initial appearance. He then had seven more initial appearances and a motion hearing prior to his trial. At each of those nine appearances, the circuit court addressed Lautenbach's failure to obtain counsel.

¶3 At the first initial appearance on July 7, 2008, the court reviewed the complaint with Lautenbach, including the alleged crimes and their maximum penalties. The court further advised Lautenbach he was entitled to an attorney at public expense if he could not afford one. The court then asked whether Lautenbach intended to obtain an attorney. After interruptions by Lautenbach, the court inquired four more times about obtaining a lawyer, and finally adjourned the hearing to allow Lautenbach to decide what he wanted to do about counsel.

¶4 At the July 14, 2008, adjourned initial appearance, Lautenbach indicated he wanted sixty days to hire an attorney. The court adjourned until July 21 to allow Lautenbach to get an attorney. On August 6, the court attempted to conduct the fourth initial appearance. Referring to the July 21 initial appearance, the court inquired whether Lautenbach was considering retaining a specific attorney. After Lautenbach responded affirmatively, the court inquired further but Lautenbach ignored the question and attacked the sufficiency of the complaint. The court warned Lautenbach that "at some point I'm going to get to the point where I'm going to have to determine that you've forfeited your right to

an attorney." The court warned Lautenbach to make a good faith effort to obtain an attorney by the next hearing or it would decide whether he had forfeited his right to counsel.

¶5 On August 26, 2008, at the fifth initial appearance, the court reviewed what had transpired in the case up to that date, including reference to Lautenbach's right to counsel. Noting that Lautenbach had filed a disqualification notice, the court explained the proper procedure to request a substitution of judge. The court informed Lautenbach that if it was still assigned to the case at the next initial appearance, it would address the issue of counsel.

¶6 On September 8, 2008, the sixth initial appearance, the court immediately inquired of Lautenbach's efforts to obtain an attorney. Lautenbach ignored the court's inquiry and attempted to question the district attorney. When directed to answer the court's question, Lautenbach stated he "talked to a couple of attorneys," but "I do not need an attorney at this point in time." However, Lautenbach refused to waive his right to an attorney and declared, "There is not a case against me." The court repeatedly inquired of Lautenbach about his efforts to obtain an attorney, but Lautenbach refused to continue engaging the court, stating, "You've already been recused." The court gave Lautenbach one last chance to get an attorney or it would conclude he was obstructing the court and trying to delay, and the court would decide whether he forfeited his right to an attorney.

¶7 Again on September 29, 2008, the seventh initial appearance, the court inquired whether Lautenbach obtained an attorney. Lautenbach ignored the court's questions, asking his own questions instead. He later told the court he had not retained an attorney and did not need one. The court stated it intended to enter a plea on Lautenbach's behalf and instructed him how to file a proper substitution

request. Lautenbach responded by asking the court: "Are you trying to be my attorney? Are you taking role as my attorney?" Ultimately, the court directed Lautenbach to take a piece of paper and write his substitution request on it. The court immediately granted the request and Judge Peter Diltz was removed from the case.

¶8 On December 1, 2008, Judge D. Todd Ehlers conducted an eighth initial appearance and inquired about Lautenbach's intentions regarding legal representation. After the court asked two more times, Lautenbach replied, "I will get an attorney if there is [sic] reasons and there is a case against me, a legal case against me, then I'll get one." The court explained that Judge Diltz already disposed of Lautenbach's arguments, and inquired again about hiring an attorney. Lautenbach reiterated his position and stated he wanted the case dismissed. The court again asked when Lautenbach would have an attorney and Lautenbach responded, "When the proper procedure is filed against me, then I will get an attorney." The court observed that Lautenbach's first initial appearance had occurred nearly five months earlier and stated:

> You've had adequate time to find an attorney and have legal representation in this matter. If you aren't going to move forward with that, that's going to be a decision you are going to make, sir, but I'm entering a not guilty plea on your behalf to both of these charges, and we're going to set this on for pretrial and trial.

¶9 Lautenbach filed a motion to dismiss, which was heard on January 27, 2009. The State encouraged the defendant to hire legal counsel and noted Lautenbach "has previously been charged with criminal offenses and has had legal counsel and has successfully completed those entire processes." The court stated it was no longer going to address the issue of legal representation, telling Lautenbach:

> [Y]ou've been given adequate opportunity to attain legal representation in this matter. You have apparently chosen not to exercise that right and this matter is going to proceed forward with trial on the 18th of February. If you decide suddenly to get an attorney involved at the last minute or not, that is your decision at this point ....

¶10 At trial, the State successfully moved to exclude the testimony of two police officers who Lautenbach acknowledged he subpoenaed in an effort to attack the sufficiency of the complaint and demonstrate he was entitled to a preliminary examination. Lautenbach vehemently objected and then stated he wished to waive his right to a jury trial. The court held a colloquy with Lautenbach and stated, "I find today that the defendant ... is competent to and that he is today freely, knowingly, intelligently, and voluntarily waiving his right to a jury trial in this matter ...." The trial then proceeded, but Lautenbach refused to participate and did not testify or question any witnesses. The court found Lautenbach guilty on both counts. Lautenbach, with counsel, now appeals.

DISCUSSION

¶11 The right to counsel is guaranteed by both the United States and Wisconsin Constitutions. ***State v. Cummings***, 199 Wis. 2d 721, 747-48, 546 N.W.2d 406 (1996). Nevertheless, a defendant "may, by his or her conduct, forfeit the right to counsel." ***State v. Coleman***, 2002 WI App 100, ¶16, 253 Wis. 2d 693, 644 N.W.2d 283. This most often occurs in the case of manipulative or disruptive defendants, ***id.***, where the defendant "obstruct[s] the orderly procedure of the courts or ... interfere[s] with the administration of justice." ***State v. Woods***, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). Forfeiture of the right to counsel occurs "not by virtue of a defendant's express verbal consent to such procedure, but rather by operation of law because the defendant has deemed *by his own actions* that the case proceed accordingly." ***Id.*** at 715-16.

¶12 Forfeiture of the right to counsel is different from waiver, ***State v. McMorris***, 2007 WI App 231, ¶23, 306 Wis. 2d 79, 742 N.W.2d 322, which requires an appropriate colloquy between the court and the defendant. ***State v. Klessig***, 211 Wis. 2d at 206, 564 N.W.2d 716 (1997). In contrast to that mandatory inquiry, courts are merely encouraged to follow several recommendations to determine whether a defendant has forfeited the right to counsel.[2] ***Cummings***, 199 Wis. 2d at 756 n.18.

¶13 However, even in the case of forfeiture, a court must still determine whether the defendant is competent to proceed without an attorney. ***Coleman***, 253 Wis. 2d 693, ¶¶32-35. Further, "[t]he circuit court's determination of a defendant's competency to proceed pro se must appear in the record." ***Klessig***, 211 Wis. 2d at 212. Nonetheless, a court's failure to make a competency determination on the record will not require reversal where the entirety of the record demonstrates a defendant was competent to proceed pro se. *See* ***id.*** at 213-14. If competence is not clear from the record, an appellate court may remand for the circuit court to either decide whether it can determine competence after the fact, and if so, hold a competency hearing, or to grant a new trial. ***Id.*** at 213.

¶14 Lautenbach presents two arguments in his brief on appeal, the first of which is titled: "Lautenbach was not competent to proceed pro se at trial." In

[2] The Wisconsin Supreme Court suggests courts employ the following procedures before determining a defendant has forfeited the right to counsel: (1) provide explicit warnings that if the defendant persists in the specific conduct the court will deem the right to counsel forfeited and require the defendant to proceed pro se; (2) make the defendant aware of the difficulties and dangers inherent in self-representation; (3) provide 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. ***State v. Cummings***, 199 Wis. 2d 721, 756 n.18, 764, 546 N.W.2d 406 (1996) (majority and Geske, J. dissenting).

the body of that argument, however, Lautenbach primarily argues he did not knowingly, intelligently, and voluntarily waive his right to counsel. As noted above and in the State's response brief, waiver is not the same as forfeiture. In his reply brief, Lautenbach continues to confuse waiver and forfeiture and does not present any coherent argument asserting he did not *forfeit* his right to counsel. Thus, we deem that issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In any event, the record amply supports the circuit court's determination that Lautenbach forfeited his right to counsel. Lautenbach engaged in significant obstruction and delay of the proceedings.

¶15 Lautenbach's forfeiture concession notwithstanding, he does assert he was not competent to proceed without counsel. He argues the court did not consider his education, literacy, or physical or psychological condition that may significantly affect his ability to communicate defenses to the jury, *see* ***Klessig***, 211 Wis. 2d at 212, or his familiarity with courtroom proceedings. He further contends his filing of a "disqualification notice" instead of a substitution request indicates his lack of understanding of court procedures.

¶16 The circuit court never inquired or determined on the record whether Lautenbach was competent to proceed pro se. "[T]he 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." ***Id.*** (quoted source omitted). For his part, Lautenbach identifies no such problem or disability, excepting his unfamiliarity with proper court procedures. Unfamiliarity with court procedure is not, however, a factor bearing on a defendant's competence. *See* ***Faretta v. California***, 422 U.S. 806, 836 (1975). If it were, most defendants

would be deemed incompetent to proceed pro se. Further, despite the improper procedure, Lautenbach did successfully substitute the circuit court judge.

¶17 The State emphasizes that the court found Lautenbach competent to waive his right to a jury trial. While that finding supports a finding of competence to proceed pro so, the State offers no authority indicating one inquiry may substitute for the other. Indeed, in Wisconsin, competency to proceed pro se is determined by a higher standard than competency to stand trial. ***Klessig***, 211 Wis. 2d at 212. The State argues Lautenbach further demonstrated competence to represent himself by his filing of motions, letters, and notices. We agree.

¶18 Although ultimately not successful on the merits, Lautenbach presented constitutional and jurisdictional challenges, citing case law and constitutional provisions. He showed an ability and willingness to object and speak out in court proceedings. He successfully subpoenaed witnesses to appear at trial. Immediately before trial, he made a strategic decision to waive his jury right. Although the circuit court disagreed with Lautenbach's legal arguments, Lautenbach was able to successfully convey the substance of his positions.

¶19 The record does not indicate Lautenbach's level of education. Nonetheless, based on his filings and oral arguments, we can discern Lautenbach was of at least average intelligence, literate, and fluent in English. *See* ***id.*** There is no evidence in the record indicating Lautenbach had any physical or mental disability impairing his ability to present a defense, had he wished to do so. He also does not assert any such disability on appeal. We therefore conclude that the totality of the record demonstrates Lautenbach's competence to proceed without an attorney.

¶20 Lautenbach's second argument on appeal is that he was deprived of his constitutional right to present a defense because the circuit court excused his two subpoenaed witnesses without requiring them to testify at the trial. The witnesses were excused on the State's motion after Lautenbach explained his reason for their testimony. Lautenbach intended to question the witnesses in an attempt to demonstrate that the criminal complaint was deficient and that the court lacked jurisdiction because Lautenbach did not receive a preliminary examination. The court, having already ruled on those legal issues, did not err by precluding trial testimony pertaining solely to those issues. A defendant has no constitutional right to present irrelevant evidence. ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994). Lautenbach also argues his right to present a defense was violated because he was incompetent to proceed pro se. Our determination that Lautenbach was competent obviates the need to address this argument further.

By the Court.—Judgment affirmed.

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