**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 17, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos. 2012AP1668-CR**
**2012AP2150-CR**

**Cir. Ct. Nos. 2002CF6640**
**2008CF5355**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIC A. JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEALS from a judgment and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, DENNIS R. CIMPL and STEPHANIE ROTHSTEIN, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. In these consolidated appeals, Eric A. Johnson appeals from a judgment convicting him of delivery of a controlled substance-

cocaine (one gram or less) and possession with intent to deliver a controlled substance-cocaine (more than one gram but not more than five grams), *see* WIS. STAT. §§ 961.41(1)(cm)1g., & 961.41(1m)(cm)1r. (2007-08),[1] and from orders denying his postconviction motions seeking modification of his reconfinement sentence and challenging the validity of the waiver of his right to trial counsel. We affirm.

## BACKGROUND

¶2 In 2002, a jury convicted Johnson, who represented himself at trial, of burglary. *See* ***State v. Johnson***, Milwaukee Cnty. Case No., 2002CF6640 (the 2002 case). He was sentenced to five years of initial confinement and five years of extended supervision.[2]

¶3 In 2008, while out on extended supervision, he was charged with delivery of a controlled substance-cocaine and possession with intent to deliver a controlled substance-cocaine. *See* ***State v. Johnson***, Milwaukee Cnty. Case No., 2008CF5355 (the 2008 case). As a result of the charges, Johnson was revoked on his 2002 case and reconfined for four years, nine months, and thirteen days, the maximum available.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable David A. Hansher presided over the trial and sentenced Johnson in the 2002 case.

¶4 In the 2008 case, Johnson again represented himself at trial (with the assistance of standby counsel) and was convicted by a jury.[3] The circuit court sentenced him to four years of initial confinement and four years of extended supervision on each count, to run concurrent to each other and concurrent to his reconfinement sentence in the 2002 case.

¶5 A no-merit report was filed in the 2008 case, and this court directed Johnson's counsel to file a supplemental report addressing why an arguably meritorious challenge to his waiver of the right to trial counsel could not be pursued. Counsel responded that, in her view, further postconviction proceedings were warranted and moved to dismiss the no-merit appeal. Consequently, we rejected the no-merit report, dismissed the appeal, and extended the deadline for counsel to file a postconviction motion. *See* ***State v. Johnson***, No. 2010AP671-CRNM, unpublished op. and order (WI App Nov. 2, 2011).

¶6 Counsel subsequently filed a postconviction motion arguing that Johnson did not enter a valid waiver of his right to trial counsel in accordance with ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). Prior to having a hearing on the postconviction motion, the parties, believing Johnson's release date was in July 2012, agreed to resolve the 2008 case: They would seek a joint

[3] The Honorable Rebecca F. Dallet conducted the colloquy with Johnson when he waived his right to trial counsel, presided over his jury trial, and sentenced Johnson in the 2008 case.

modification of Johnson's sentence in the 2008 case to time served and in exchange, Johnson would withdraw his postconviction motion.[4]

¶7 At the motion hearing on April 10, 2012, the circuit court approved the parties' agreement and amended the judgment of conviction to reflect Johnson's new sentence, which was to be a time-served disposition, to again run concurrent to Johnson's reconfinement sentence.[5] Johnson accordingly withdrew his postconviction motion.

¶8 Despite the amended judgment of conviction, the Department of Corrections (DOC) would not release Johnson. As a result, Johnson filed an emergency motion for an order directing the DOC to immediately release him from custody. The circuit court signed the proposed order for Johnson's immediate release from custody. In response, the DOC explained to the circuit court its position that despite the court's order, Johnson's reconfinement sentence in the 2002 case prohibited his release. The DOC further advised that Johnson's release date on his reconfinement sentence was July 2013—not July 2012 as the parties had believed.

¶9 Consequently, in an attempt to achieve the result the parties had previously agreed to, on April 24, 2012, Johnson moved for sentence modification

[4] Johnson's counsel claims the Department of Corrections (DOC) told her Johnson's release date was in July 2012.

[5] The motion was assigned to the Honorable Michael D. Guolee as a result of judicial rotation.

in the 2002 case. The circuit court denied the motion, concluding that it had "intended for the defendant to serve the full four years, nine months and thirteen days left on his sentence in confinement."[6] The circuit court's order further stated:

> The postconviction proceedings in case 08CF005655 have no bearing on the court's reconfinement decision. While the parties may have entered into a stipulation in 08CF005655 that was intended to release the defendant from prison, the parties and the court were under the mistaken impression that the defendant was entitled to release in July 2012, when in fact he is not to be released until July 2013. This mistake of fact may undercut the purpose of the stipulation entered in 08CF005655; however, it does not qualify as a new factor for purposes of modifying the reconfinement order in 02CF006640. In this situation, the defendant's remedy is not to challenge the validity of the reconfinement order in 02CF006640 but rather the viability of the stipulation entered in 08CF005655.

The circuit court then denied Johnson's motion to modify his sentence in the 2002 case and vacated the portion of the circuit court's prior order calling for Johnson's immediate release in the 2002 case. Because Johnson was serving the sentences in the 2002 and the 2008 sentences concurrently, the shortened sentence in the 2008 case had no practical effect—Johnson remained in custody on the longer 2002 reconfinement sentence. Johnson appealed.

¶10 Given that the parties' agreement was no longer possible, Johnson renewed his previously withdrawn postconviction motion in the 2008 case

[6] The Honorable Dennis R. Cimpl entered the decision and order denying Johnson's motion for postconviction relief and partially vacating the circuit court's prior order calling for Johnson's immediate release in the 2002 case. Judge Cimpl also ordered the reconfinement sentence in the 2002 case.

challenging the circuit court's decision permitting him to represent himself. He also asked the circuit court to vacate its April 10, 2012 judgment, which amended his sentence. Upon the parties' stipulation, the circuit court granted the latter request, vacating the amended sentence and reinstating the original sentence. After an evidentiary hearing, the circuit court concluded that Johnson had validly waived his right to trial counsel and that he was competent to do so.[7] Johnson appealed.

¶11 Johnson's appeals were subsequently consolidated. He argues that the State's refusal to release him and the circuit court's refusal to modify the reconfinement sentence in the 2002 case violated his constitutional right to the benefit of his bargain. In the event this court disagrees with him on the first point, Johnson asks that we address his argument that the postconviction court erred when it refused to grant him relief on his claim that he did not knowingly, voluntarily, and intelligently waive his right to trial counsel.

[7] The Honorable Stephanie G. Rothstein entered the order vacating the April 10, 2012 amended sentence and reinstating the original sentence. She also presided over the postconviction motion hearing and entered the order denying it.

## DISCUSSION

### I. Whether Johnson is entitled to relief regarding the vacated agreement.[8]

¶12 While acknowledging that the parties labored under a mistaken belief as to his release date, Johnson nevertheless submits that he was constitutionally entitled to receive the benefit of his bargain, citing ***Santobello v. New York***, 404 U.S. 257 (1971). *See* ***id.*** at 262 ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). He faults the State for its refusal to release him and the circuit court for its refusal to modify his reconfinement sentence in the 2002 case.

¶13 We set aside for purposes of resolving this appeal whether the parties' mistaken belief as to a foundational aspect of their agreement (i.e., Johnson's release date) defeated its terms.[9] *See* ***State v. Deilke***, 2004 WI 104, ¶12, 274 Wis. 2d 595, 682 N.W.2d 945 ("A plea agreement is analogous to a contract, though the analogy is not precise."). Instead, we agree with the State that when the circuit court granted Johnson's postconviction motion to vacate the sentence imposed on April 10, 2012, it effectively put the parties back to where they started. Namely, the circuit court's order returned to Johnson his right to pursue appellate relief from the judgment of conviction in the 2008 case. Thus, even if we assume for the sake of argument that there was a breach, allowing Johnson to

[8] We set aside any potential mootness issue at this juncture, as the parties neither briefed it nor filed motions addressing it.

[9] On this point, Johnson simply asserts that the fact that the parties "labored under the mistaken belief" as to his release date "did not absolve the State of its obligation to release [him]."

proceed with his previously withdrawn postconviction motion was an appropriate remedy.[10] *See, e.g.*, ***id.***, ¶25 (appropriate remedy where there is a breach of a plea agreement includes vacating the negotiated plea agreement and returning the defendant to his original position).[11] As a result of this conclusion, we reach Johnson's second argument.

## II. Whether Johnson knowingly, intelligently, and voluntarily waived his right to counsel.

¶14 Johnson asserts that the postconviction court erred when it denied him relief on his claim that he did not knowingly, voluntarily, and intelligently waive his right to counsel. Johnson specifically contends that the circuit court never discussed with him the nature of the offenses or the range of penalties he faced. He argues that as a result, he did not fully grasp the ramifications of his decision to represent himself. In addition, Johnson submits that "[his] severe mental illness, which he had suffered for years, rendered him incapable of representing himself, even if he had understood the nature of the charges and the potential penalties."

¶15 A criminal defendant has the right, under both the United States and Wisconsin Constitutions, to be assisted by counsel. *See* ***State v. Imani***, 2010 WI 66, ¶20, 326 Wis. 2d 179, 786 N.W.2d 40. The implicit corollary to this right is the defendant's right to self-representation. *See* ***id.*** Denial of either right is a

[10] Johnson claims that the DOC's conduct, in failing to release Johnson, breached the agreement and that that conduct is attributable to the State.

[11] To the extent Johnson is challenging the circuit court's refusal to modify his reconfinement sentence in the 2002 case, he does not offer any specific analysis on this issue, and as such, we do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).

structural error, subject to automatic reversal. *See* ***State v. Harvey***, 2002 WI 93, ¶37, 254 Wis. 2d 442, 647 N.W.2d 189. However, the right to an attorney is so important that nonwaiver of that right is presumed. *See* ***Imani***, 326 Wis. 2d 179, ¶22. The presumption may be overcome only by an affirmative showing that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. ***Id.***

¶16 In ***Klessig***, our supreme court explained:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

***Id.***, 211 Wis. 2d at 206. If the defendant does not fulfill these criteria, knowing and voluntary waiver will not be found, and the circuit court must prevent the defendant from representing himself. *See* ***id.*** at 203-05.

¶17 "When an adequate colloquy is not conducted, and the defendant makes a motion for a new trial or other postconviction relief from the circuit court's judgment, the circuit court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary." ***Id.*** at 206-07. At the evidentiary hearing, the State bears the burden of proving by clear and convincing evidence that the waiver was appropriate: "If the State is able to satisfy its burden, the conviction will stand. If the State is unable to establish by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel, the defendant will be entitled to a new trial." ***Id.*** at 207.

¶18 "Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which [a reviewing] court determines independently." ***Imani***, 326 Wis. 2d 179, ¶19.

¶19 The State did not dispute that the circuit court's colloquy was inadequate. As a result, the postconviction court held an evidentiary hearing. After listening to the testimony of Johnson and his standby counsel, the postconviction court denied Johnson's motion, ultimately agreeing with the State that Johnson was aware of the penalties and serious nature of the offense insofar as he had received a copy of the criminal complaint and original information and had been further notified of the sentencing structure when the State amended one of the counts against him to a drug offense involving less drugs.

¶20 Notably, Johnson testified during the hearing that he was generally aware of the penalties he was facing. His counsel questioned him:

> [DEFENSE COUNSEL:] Did you know exactly how much time you were facing at that time?
>
> [JOHNSON:] No.
>
> [DEFENSE COUNSEL:] You could guess maybe but you didn't know specifically?
>
> [JOHNSON:] Yeah. I guessed a lot.
>
> ….
>
> [DEFENSE COUNSEL:] You guessed that it would be a lot of time?
>
> [JOHNSON:] Yes.

The prosecutor followed up:

> [THE PROSECUTOR:] And [at the time you decided to represent yourself] were you considering that you were facing jail?

> [JOHNSON:] Prison.
>
> [THE PROSECUTOR:] You thought that you were facing prison. Did you think that you might be facing prison for a long time?
>
> [JOHNSON:] Yes.
>
> [THE PROSECUTOR:] And were you thinking that you might be going to prison for years?
>
> [JOHNSON:] Yes.
>
> [THE PROSECUTOR:] And you had been previously imprisoned in that [2002] burglary case, correct?
>
> [JOHNSON:] Correct.
>
> [THE PROSECUTOR:] And after that you were placed on some form of supervision by the Department of Corrections, am I right?
>
> [JOHNSON:] Correct.
>
> [THE PROSECUTOR:] Did you know whether or not you were facing a matter of years in prison on the new drug cases?
>
> [JOHNSON:] Yes.
>
> [THE PROSECUTOR:] Do you recall whether or not the charges were changed because the drugs came back lighter than what they originally were weighed?
>
> [JOHNSON:] Yes.
>
> [THE PROSECUTOR:] And do you recall an Information being amended and changed after you had been told you have to go without an attorney? Do you recall that happening?
>
> [JOHNSON:] Yes.

¶21 We agree with the postconviction court's conclusion that the State met its burden of establishing by clear and convincing evidence that Johnson knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. *See* ***Klessig***, 211 Wis. 2d at 207.

### III. Whether Johnson was competent to proceed *pro se*.

¶22 Even with a valid waiver, however, the defendant must also be competent to proceed *pro se*. ***Imani***, 326 Wis. 2d 179, ¶15. Johnson argues that he was not competent to represent himself because of his history of mental illness.

¶23 "Whether a defendant is competent to proceed *pro se* is 'uniquely a question for the [circuit] court to determine.'" ***Id.***, ¶37 (citation omitted).

> "It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense." In determining whether a defendant is competent to proceed *pro se*, the circuit court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense. A defendant of average ability and intelligence may still be adjudged competent for self-representation, and accordingly, a defendant's "timely and proper request" should be denied only where the circuit court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense. While the determination of competency rests significantly upon the circuit court's judgment and experience, the determination must appear in the record. Our review is limited to whether the circuit court's determination is "totally unsupported by the facts apparent in the record."

***Imani***, 326 Wis. 2d 179, ¶37 (citations omitted).

¶24 As the State notes, Johnson made no specific complaints regarding his history of mental illness at the time he asked the circuit court to proceed *pro se*. At that time, the circuit court inquired into Johnson's mental and emotional state:

> THE COURT: And have you ever received any treatment for mental or emotional problems?
>
> [JOHNSON]: Several times.

THE COURT: All right. What kind of problems?

[JOHNSON]: Stress, mental stress, severe depression.

THE COURT: Are you still being treated for depression?

[JOHNSON]: Yes.

THE COURT: Do you take anything?

[JOHNSON]: Yes.

THE COURT: What do you take?

[JOHNSON]: A-sin-er-ole (phonetic).

THE COURT: Does that make you feel better?

[JOHNSON]: Not really.

THE COURT: All right. What about side affects [sic], do those affect you at all?

[JOHNSON]: I haven't noticed any difference.

THE COURT: And have you had any alcohol or intoxicants today?

[JOHNSON]: No.

THE COURT: And the only medicine you took was that medication for depression?

[JOHNSON]: I haven't had any today.

….

THE COURT: All right. So I am looking at your last case. You did do the trial. That was in 2003. You represented yourself, and you did have standby counsel. And so far you understand everything that is going on in this case, right?

[JOHNSON]: Yes.

THE COURT: And you are saying to me that you do not want a lawyer to represent you?

[JOHNSON]: No, ma'am.

¶25 Against this backdrop, we cannot conclude that "the circuit court's determination is 'totally unsupported by the facts apparent in the record.'" *See* ***id.*** (citation omitted). Moreover, as stated, "a defendant's 'timely and proper request' should be denied only where the circuit court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense." ***Id.*** (citation omitted).

¶26 At the postconviction motion hearing, Johnson testified that he has suffered from depression and paranoid schizophrenia for a long time, "15 years maybe." He stated that when the schizophrenia interferes with his life, he feels lost. In his reply brief, Johnson submits that "[r]equiring a mentally ill person to point out his own mental illness, particularly when it involves paranoid schizophrenia[,] is an impossible burden to meet." On this record, we are not convinced.[12]

¶27 Additionally, we share in the concern raised by the State that Johnson should not now be able to contend that he was unable to adequately represent himself after clearly expressing his desire to do so at the time:

> Inherent in a defendant's decision to represent himself is the risk that a defense not known to him will not be presented during trial. When a defendant undertakes *pro se* representation that is the risk he knowingly assumes. If his strategy in proceeding *pro se* results in a valid defense

[12] After its colloquy, the circuit court stated:

> All right. Well, I will go ahead and find that you are freely, voluntarily[,] and intelligently waiving your right to have an attorney. I believe you have enough, certainly enough, intelligence, and you have actually done this before [i.e., Johnson had represented himself in a prior case], Mr. Johnson, something I don't see all that often, to know what you're doing, at least as far as what you're getting yourself into.

> being waived, it reflects the hazards of his decision to waive counsel. To rescue this defendant from the folly of his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel. Moreover, ordering a new trial would … encourage defendants to proceed *pro se* believing that they would have an opportunity to have a second trial with counsel if they were dissatisfied with the first verdict. Multiple trials would strain our limited judicial resources and would compromise the finality of judgments.

*See* ***State v. Clutter***, 230 Wis. 2d 472, 477-78, 602 N.W.2d 324 (Ct. App. 1999).

*By the Court.*—Judgment and orders affirmed.

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