

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP1651-CR

Cir. Ct. No. 2011CF417

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BEGOLL AZIZI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Begoll Azizi appeals his conviction for operating a motor vehicle while intoxicated (OWI), sixth offense, and an order denying postconviction relief. Azizi contends that the trial court impermissibly denied him his right to self-representation and his right to compulsory process. We affirm.

¶2 After a jury found him guilty of operating a motor vehicle while under the influence of a controlled substance, Azizi was convicted of OWI, sixth offense, pursuant to WIS. STAT. § 346.63(1)(a) (2011-12).¹ Postconviction, Azizi filed a pro se motion for a new trial in which he alleged that the trial court violated his constitutional rights to represent himself and to compulsory process. The trial court denied the motion. Azizi appeals.

Right to Self-Representation

¶3 The Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant both the right to counsel and the right to self-representation. See *Faretta v. California*, 422 U.S. 806, 818-21 (1975); *State v. Klessig*, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). To safeguard these rights, before a defendant is permitted to proceed pro se, “the [trial] court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se.” *State v. Imani*, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. “Whether [a defendant]’s constitutional right to self-representation was violated presents a question of law, which we review de novo.” *State v. Darby*, 2009 WI App 50, ¶13, 317 Wis. 2d 478, 766 N.W.2d 770.

¶4 To invoke the right to self-representation, a defendant must clearly and unequivocally demand the right to proceed pro se. *Id.*, ¶24. Only a clear and unequivocal demand triggers the trial court’s obligation to ensure a valid waiver of the right to counsel and competency to proceed pro se. *Id.*, ¶¶18-19, 24. This

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

“clear and unequivocal” threshold is critical for two reasons. First, it prevents a defendant from inadvertently waiving the right to counsel. *Id.*, ¶20. “Because a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself.” *Id.* (citation omitted). Second, it “prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation.” *Id.* (citation omitted). A “clear and unequivocal” standard prevents a defendant who vacillates at trial between wanting to be represented by counsel and wanting self-representation from claiming on appeal that the trial court, in granting one of the two requests, denied him the right to the other. “The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he [or she] equivocates, he [or she] is presumed to have requested the assistance of counsel.” *Id.* (citation omitted). Finally, a defendant’s expressed dissatisfaction with current counsel is insufficient to establish that a request to proceed pro se is clear and unequivocal. *Id.*, ¶26.

¶5 Regarding the timeliness of a request to proceed pro se, while the Sixth Amendment seeks to ensure the defendant’s interest in a fair trial, the state has an interest in avoiding any interference with the orderly administration of justice and in preserving the integrity of the trial process. *Hamiel v. State*, 92 Wis. 2d 656, 672, 285 N.W.2d 639 (1979). When raised at the last minute, both a request for new counsel and a request to proceed pro se can have adverse effects on the judicial system. *Id.* at 673. “[The two rights] are not intended to allow the defendant the opportunity to avoid or delay the trial for any unjustifiable reason.” *Id.* (emphasis omitted). Therefore, “[e]leventh-hour requests are generally frowned upon as a mere tactic to delay the trial.” *State v. Lomax*, 146 Wis. 2d 356, 361-62, 432 N.W.2d 89 (1988) (upholding denial of substitution of counsel).

If the court grants an eleventh-hour request to proceed pro se, it must also grant a continuance to allow the defendant the time to prepare a defense. *Hamiel*, 92 Wis. 2d at 674. Thus, the court must weigh the defendant’s right to proceed pro se with the “convenience of the witnesses, jurors, and the court schedule” in deciding whether to grant the untimely request. *Id.* at 673. Where a request to proceed pro se is made on the day of trial, the determinative question is whether the request is proffered merely to secure a delay or tactical advantage. *Id.*

¶6 Here, Azizi’s untimely request to proceed pro se was not clear and unequivocal. At a motion hearing on the day before trial, Azizi first requested substitution of counsel, criticizing his appointed counsel for deciding not to call two witnesses whom Azizi said he wanted to testify. One witness was a state trooper who was at the scene of Azizi’s stop, and the other was an unidentified doctor. Azizi’s counsel did not intend to call these witnesses, and Azizi himself did not know what they would say. Based on this disagreement on strategy, Azizi said he wanted new counsel, telling the trial court, “I waive my right to Sixth Amendment of counsel. I do not want her at all.” Counsel told that court that the “strategy that’s been developed ... is consistent with the goals of the representation that [Azizi] laid out.” Thus, Azizi initially requested a new lawyer on the day before trial because his counsel did not intend to call two witnesses that Azizi identified but did not know how they would help his defense. It was only as an alternative to new counsel that Azizi sought to proceed pro se. And then, Azizi acknowledged that he would not be capable of conducting a jury trial on his own.

¶7 Regarding the timing of Azizi’s equivocal request to proceed pro se, the trial court said:

This matter has been pending for some time now. It is the day before the trial, in fact the day that the trial was

supposed to have begun. The Court is concerned that this issue at this late hour is more a tactic to stall than a tactic to deal with legitimate issues involved in the defense of the case.

¶8 Given Azizi's eleventh-hour request, his vacillating between a request for new counsel and a request to proceed pro se, and his own acknowledgment that he was incapable of representing himself, it can hardly be said that Azizi's request was "a deliberate choice to proceed without counsel." *Imani*, 326 Wis. 2d 179, ¶28. The trial court's decision to deny Azizi's request to proceed pro se, based on its conclusion that neither good cause for the last-minute request nor grounds for a continuance had been shown, and that the request was merely a tactic to delay rather than to address legitimate issues involved in the defense, was an appropriate exercise of discretion. *See Hamiel*, 92 Wis. 2d at 672 (whether to grant untimely request to proceed pro se is within discretion of trial court).

¶9 In sum, only a defendant's clear and unequivocal request to proceed pro se, made in a timely manner, *see id.*, requires the trial court to entertain the defendant's request and undertake the two-part colloquy on waiver of counsel and competency to proceed pro se, *Darby*, 317 Wis. 2d 478, ¶¶18, 24. Here, the trial court properly denied Azizi's request to proceed pro se for all the reasons succinctly set forth by the trial court:

The Court is not going to allow you to ... waive your right to counsel at this point. You yourself have told the Court that you don't think that you are capable of handling the jury trial on your own.

This is an issue dealing with one witness. I don't know anything about the witness. I don't know what the witness would say. It's a disagreement ... as to the strategy to be employed to meet the goals of this representation in this case. But I'm not going to get into that at the eleventh

hour, nor am I going to remove counsel and have you be here incapable of conducting a jury trial and not prepared.

If, in fact, this was a case that you had chosen to waive counsel and you were ready to proceed to try the case and you were prepared, that would be one thing. But this trial starts tomorrow morning. There is no way that you ... could be prepared to conduct a jury trial tomorrow.

Right to Compulsory Process

¶10 Azizi also contends that he was denied the right to compulsory process because the trial court refused his request to compel a state trooper to testify at trial. *See* U.S. CONST. amend. VI; WIS. CONST., art. I, § 7. First, it is the litigants, not the court, who decide whether to call a particular witness. Here, defense counsel made a strategic choice not to call the state trooper. Second, Azizi did not even know, either at trial or at the postconviction hearing, what the trooper would say or would have said. The trial court did not err when it refused Azizi's request to compel the attendance of the state trooper where defense counsel had made a strategic decision not to call the witness at trial.

¶11 Finally, Azizi argues that the trial court erred in denying him postconviction relief. Azizi's postconviction motion failed for all the reasons explained above.

By the Court.—Judgment and order affirmed.

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

