

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 10, 2015**

Diane M. Fremgen  
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 Nos. 2014AP2053-CR  
2014AP2054-CR**

**Cir. Ct. Nos. 2010CF4751  
2010CF6162**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEYUL THAMES,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and JOHN SIEFERT, Judges.  
*Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Deyul Thames appeals judgments of conviction and an order denying a postconviction motion without a hearing.<sup>1</sup> Thames contends that he was denied due process, the right to self-representation, and the effective assistance of counsel. He also argues that his postconviction motion set forth sufficient material facts to entitle him to an evidentiary hearing. For the reasons set forth below, we reject these arguments. We affirm the judgments of conviction and the order denying postconviction relief.

¶2 In November 2010, Thames was charged with multiple drug and gun charges, all as a repeater, and was taken into custody. In December 2010, Thames was charged with solicitation of perjury and conspiracy to commit first-degree intentional homicide, both as a repeater, based on alleged communications that Thames had with individuals outside the jail while Thames was in custody pending the drug and gun charges. Because of those allegations, the circuit court issued an order rescinding Thames's custodial telephone, visitation, and mail privileges, with the exception of Thames's communications with his attorney. *See* WIS. STAT. § 940.47 (2013-14).<sup>2</sup>

¶3 Following a consolidated trial, Thames was convicted of multiple counts and was sentenced to prison. Thames filed a postconviction motion for a new trial, arguing that: (1) the court's order rescinding Thames's communication privileges violated Thames's due process right to access to the courts; (2) the court

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<sup>1</sup> The Honorable Charles F. Kahn, Jr., presided over trial and entered the judgments of conviction, and the Honorable John Siefert entered the order denying Thames's postconviction motion.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

denied Thames his right to self-representation; and (3) Thames was denied the effective assistance of counsel based on a conflict of interest. The circuit court denied Thames's postconviction motion without a hearing. Thames appeals.

¶4 Thames argues that the order rescinding his custodial communication privileges under WIS. STAT. § 940.47 denied him his due process right to access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) (prisoners have constitutional right to access to the courts). Thames contends that the purpose of § 940.47 is to ensure that prisoners do not interfere with the administration of justice or direct criminal activity while in custody, and that the order restricting Thames's communications except those with his attorney unnecessarily deprived him of all direct communication with the courts. Thus, Thames argues, there was no "predominant compelling public interest" to justify the order limiting Thames's access to the courts, *see State ex rel. Thomas v. State*, 55 Wis. 2d 343, 353, 198 N.W.2d 675 (1972), and the order was not narrowly tailored to serve the purpose of the statute, *see Minniecheske v. Griesbach*, 161 Wis. 2d 743, 749, 468 N.W.2d 760 (Ct. App. 1991). Thames argues that, as applied, the order deprived him of due process by preventing him from communicating his dissatisfaction with his attorney to the court in a timely manner. We disagree.

¶5 The problem with Thames's argument is that he asserts in conclusory fashion that he was unable to communicate his dissatisfaction with his attorney to the court. He does not indicate what he was prevented from communicating. Moreover, contrary to Thames's argument, the record reveals that the court allowed Thames to personally voice his dissatisfaction with his counsel numerous times.

¶6 Because Thames has not set forth facts showing that he was actually prevented from communicating any of his concerns to the court, Thames has not sufficiently alleged a due process violation. *See Johnson v. Barczak*, 338 F.3d 771, 772 (7th Cir. 2003) (prisoner claiming denial of right to access to the courts “must prove that he suffered an actual injury by showing that unjustified acts or conditions hindered his ability to pursue a nonfrivolous legal claim”).

¶7 Next, Thames contends that he expressed a desire to proceed pro se and was denied his right to self-representation when the circuit court failed to engage Thames in a colloquy regarding his expressed desire. Thames contends that, under *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the court was required to conduct a colloquy to determine whether Thames was knowingly, voluntarily, and intelligently waiving the right to counsel and whether he was competent to proceed pro se. Again, we disagree.

¶8 A circuit court is required to advise a defendant as to the right of self-representation only if the defendant clearly and unequivocally expresses a desire to proceed pro se. *State v. Darby*, 2009 WI App 50, ¶24, 317 Wis. 2d 478, 766 N.W.2d 770. Here, Thames contends that he made two clear and unequivocal requests to proceed pro se: first, when he inquired on the second day of trial as to what rights he would be giving up if he chose to represent himself; and, second, later in the trial, when Thames stated, “I’m going to have to ask the Court reluctantly—very, very reluctantly if not to give us an opportunity to prepare ... to allow me [to] represent myself” based on his belief that his counsel had not reviewed all of the discovery material. As to the first instance, a question as to what rights are forfeited or waived when one proceeds pro se is simply not a statement of the desire to proceed without counsel. As to the second instance, we conclude that, in context, Thames’s statement that he was “very, very reluctantly”

asking to represent himself if his attorney could not have an opportunity to prepare was not a clear and unequivocal statement of a desire to proceed pro se. In response to Thames's statement, the circuit court agreed to adjourn trial to the next morning to allow Thames and counsel the opportunity to prepare for the remainder of the case. Additionally, the court reminded Thames to "think long and hard about the possibility of you representing yourself and giving up your right to a lawyer." Thames does not point to any place in the record where he then, or any time thereafter, asserted a clear and unequivocal desire to proceed pro se. Accordingly, the circuit court was under no obligation to conduct a colloquy with Thames as to Thames's alleged desire to waive his right to counsel.

¶9 Finally, Thames contends that his trial counsel was ineffective because the discussions on the record between the court, Thames, and counsel as to Thames's dissatisfaction with counsel created an actual conflict of interest. *See State v. Love*, 227 Wis. 2d 60, 68-71, 594 N.W.2d 806 (1999) (an actual conflict of interest deprives a defendant of the right to effective assistance of counsel). Thames asserts, in conclusory fashion, that counsel's stated discomfort with divulging attorney-client conversations and trial strategy, and repeatedly defending his actions to the court, established an actual conflict of interest. Thames does not, however, cite any authority for the proposition that a defendant's dissatisfaction with counsel and discussions with the circuit court on that issue create an actual conflict of interest, nor does he explain how the facts in this case created an actual conflict of interest for trial counsel. Accordingly, we disagree that Thames has set forth sufficient facts to establish a claim of ineffective assistance of counsel.

¶10 For the reasons set forth above and explained in the court's order denying postconviction relief, we conclude that the circuit court properly

exercised its discretion to deny Thames's postconviction motion without a hearing. *See State v. Allen*, 2004 WI 106, ¶¶9, 12, 274 Wis. 2d 568, 682 N.W.2d 433 (if a postconviction motion is insufficient on its face to warrant relief, the circuit court may deny the motion without an evidentiary hearing).

*By the Court.*—Judgments and order affirmed.

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

