COURT OF APPEALS
DECISION
DATED AND RELEASED

March 19, 1997

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NOTICE

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No. 96-0331-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEALON R. KNECHT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Lealon R. Knecht appeals from a judgment of conviction of four counts of felony nonsupport and an order denying his motion for postconviction relief. The issues on appeal are whether Knecht was entitled to a competency evaluation, whether he made a valid waiver of the

right to counsel and the right to testify, and whether the sentence imposed was an erroneous exercise of discretion. We affirm the judgment and the order.

On January 9, 1995, Knecht made his initial appearance before the trial court. The appearance was continued in order to provide Knecht with an adequate opportunity to obtain counsel, something Knecht indicated that he wanted to do. Knecht appeared on January 23, 1995, without counsel. He explained that he had made efforts to obtain an attorney and that he was still working on it. The appearance was continued to February 6, 1995. When Knecht again appeared without counsel, a preliminary hearing was set. Knecht was advised by the court that the preliminary hearing would go forward regardless of whether he had successfully obtained counsel by that date. The preliminary hearing was held on February 15, 1995, and Knecht was without counsel. At the arraignment on February 27, 1995, the criminal information was read and the court entered a plea of not guilty upon Knecht's response that "I cannot plead, sir."

The jury trial was set for March 23, 1995. On March 17, Knecht sought an extension of time to allow him time to prepare. Although the motion indicated that Knecht had not been able to secure effective counsel, it did not indicate that Knecht was continuing his efforts to obtain counsel. The trial was held. Knecht proceeded without an attorney. Knecht was represented by counsel on the postconviction motion and on appeal.

Knecht first argues that the trial court erred in finding that there was no reason to doubt Knecht's competency to proceed to trial. The issue was

raised in Knecht's postconviction motion. Knecht sought an evidentiary hearing on his claim that he was incompetent to proceed.

Whenever there is reason to doubt a defendant's competency to proceed, the trial court must order an examination of the defendant under § 971.14, STATS. *See* ***State v. Garfoot***, No. 94-1817-CR, slip op. at 6 (Wis. Feb. 4, 1997). The basic test for determining competency under § 971.14 is whether the defendant possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether he or she possesses a rational as well as factual understanding of the proceeding against him or her. *See* ***Garfoot***, slip op. at 7. "The trial court's determination of whether there is reason to doubt the defendant's competence and order an examination is disturbed on appeal only if the trial court exhibited an erroneous exercise of discretion or if the trial court decision was clearly erroneous." ***Id.***, slip op. at 9.

Knecht contends that three indicators gave rise to a reason to doubt his competency. The first is the trial court's own observation at the initial appearance that Knecht had trouble understanding the proceedings. The trial court attempted to explain to Knecht the purpose of the preliminary examination, the next step in the criminal proceeding. Upon Knecht's second indication that he did not understand the proceeding, the trial court remarked, "Perhaps we should have a competency evaluation. I mean, if you are having trouble ...." Knecht responded, "Are you trying to intimidate me, sir?" At no

other proceeding did the trial court express any reservations about Knecht's competency.[1]

The trial court's singular expression of concern about competency does not establish a reason to doubt competency. Knecht's response to the trial court about attempted intimidation was indicative of Knecht's ability to understand the magnitude of questioning his competency. Moreover, that hearing and others continued with Knecht demonstrating a sufficient degree of understanding and an ability to participate in a rational and coherent manner. Although Knecht got hung up on the licensing requirements for attorneys, that did not detract from his ability to understand the progress of the criminal proceedings. The record reflects not that Knecht did not understand the proceedings, but that he vehemently disagreed with the trial court's jurisdiction over him.

Knecht points to the affidavits filed in support of his postconviction motion from two persons familiar with Knecht's belief system and conduct in defending the nonsupport charges. One affidavit offered the opinion that Knecht, during the pendency of the criminal proceeding, was not capable of defending himself, of understanding his right to a lawyer, or of understanding the seriousness of the charges "in light of the actual law, rather than the law as [Knecht] had fantasized it to be." The other affidavit asserted

[1] Knecht appeared before Judge Fred Hazlewood at the hearings held in January 1995. Reserve Judge Eugene McEssey presided over a continued initial appearance and the preliminary hearing in February. Judge Allan J. Deehr presided over the arraignment. Trial was held before Judge Hazlewood.

that Knecht was vulnerable to the influence of a person using Knecht for the political purpose of advancing a radical ideology. It also stated that Knecht's belief "about marriage being a sacrament between a man and woman, which government had no business to interfere with, totally clouded and prevented [Knecht] from substantially understanding the seriousness of the charges and impaired him in his ability to represent himself or to even advise a lawyer."

The affidavits make clear that Knecht held inflexible religious and political beliefs about the legal system and its ability to prosecute him. Although those beliefs made it difficult for Knecht to follow the system, they did not render him unable to understand the basics of the proceeding. In fact, Knecht filed numerous documents advancing his theories of why the prosecution was without a basis in an understandable, albeit meritless, fashion. Knecht now relies on his infusion of "mumbo jumbo" and the bizarre legal theories as evidence of his inability to understand the proceeding. That Knecht's documents lacked any legal merit does not translate into a reason to doubt his competency, but rather demonstrate the fervor with which he clung to his beliefs as a defense.

Knecht also bases his claim that a reason to doubt competency at the time of trial existed on appellate counsel's interview and opinion that competency is at issue. "[A]n attorney's statement that he questions his client's competency is not a controlling factor for initiating competency proceedings." ***State v. Weber***, 146 Wis.2d 817, 826, 433 N.W.2d 583, 587 (Ct. App. 1988). Here, counsel's assessment, made months after the proceeding, flies in the face of the

contemporaneous record of the proceedings. Knecht was able to participate in the proceeding with a sufficient understanding; he gave an opening and closing argument and cross-examined witnesses at trial. The trial court in postconviction proceedings recognized that the beliefs held by Knecht were shared by others. It found Knecht to be "intransigent" rather than potentially incompetent. We defer to the trial court's assessment of the defendant's demeanor. *See* ***id.*** at 823, 433 N.W.2d at 585. In short, Knecht's unique belief system did not give rise to a reason to doubt his competency. It was not error to refuse a psychological evaluation or an evidentiary hearing.

The next issue is whether Knecht can be held to have waived his right to counsel absent a colloquy with the trial court about such a waiver. Generally a defendant can proceed pro se only if the circuit court first determines that the defendant voluntarily and knowingly waived his or her right to counsel. *See* ***State v. Cummings***, 199 Wis.2d 721, 752, 546 N.W.2d 406, 418 (1996). Nonwaiver is presumed. *See* ***id.*** The question of whether a defendant has waived the right to counsel requires the application of constitutional principles to the facts of the particular case. *See* ***State v. Verdone***, 195 Wis.2d 476, 480, 536 N.W.2d 172, 173 (Ct. App. 1995). We review this independently of the trial court. *See* ***id.***

There was no colloquy between the trial court and Knecht to determine whether the waiver of counsel was knowingly and voluntarily made. That type of colloquy is preferred. However, we may look to the record to determine if the defendant made a knowing and voluntary waiver. *See* ***State v.***

Klessig, 199 Wis.2d 397, 404, 544 N.W.2d 605, 608 (Ct. App. 1996). In unusual circumstances, particularly those involving a manipulative or disruptive defendant, the court may find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law. *See* ***Cummings***, 199 Wis.2d at 752, 546 N.W.2d at 418.[2]

Knecht's initial appearance was twice adjourned to provide him with the opportunity to obtain counsel. At each appearance Knecht was advised of his right to counsel. At the second appearance, Knecht advised the court that he had made contact with a few attorneys but had not found anyone to effectively represent him. The trial court expressed concern that Knecht was causing unnecessary delay and impressed upon Knecht the need to make obtaining counsel a top priority. The court acknowledged that Knecht might not find an attorney who shared Knecht's philosophy about the government's lack of authority. Knecht was advised that after two more weeks to obtain counsel, it would be the "end of the rope." On the third date, about a month after the first adjournment, Knecht was advised that the preliminary hearing would go forward regardless of whether he had obtained counsel.

At trial, the court went through the history of the case and determined that Knecht's efforts to obtain counsel were not in good faith and were for the purpose of delaying the prosecution. The court found that Knecht had never sought or been denied legal representation by the state public

[2] We reject Knecht's contention that ***State v. Cummings***, 199 Wis.2d 721, 546 N.W.2d 406 (1996), cannot be applied retroactively. It did not create new legal standards.

defender. If further found that by his motions before the court, Knecht demonstrated that he wanted to have someone represent him who was not a licensed attorney. The court could not permit such representation and Knecht had been advised of that early in the proceeding.[3] The court found that Knecht never had any good faith intent of obtaining legal counsel. These findings are not clearly erroneous. *See* § 805.17(2), STATS. Indeed, Knecht went ahead and filed a plethora of pretrial motions advancing his unusual beliefs and objections.

We conclude that any attempt to have a colloquy with Knecht about the waiver of right to counsel would have been futile. The record establishes that Knecht knew of his right to counsel, that he was given an adequate opportunity to obtain counsel, and that he chose not to obtain counsel. Knecht's motion to adjourn the trial was not based on a desire to obtain counsel. Knecht's actions speak louder than words. The waiver of counsel occurred by operation of law. It was not necessary for the trial court to engage in a separate inquiry of Knecht's ability to effectively represent himself when there was no doubt as to his competency to stand trial. *See* ***Klessig***, 199 Wis.2d at 405, 544 N.W.2d at 609.

Knecht argues that there was no meaningful colloquy on his waiver of his right to testify on his own behalf.[4] It is not necessary that the trial court undertake an on-the-record colloquy concerning the defendant's waiver

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[3] Only a member of the Wisconsin bar or someone accompanied by a member of the bar may appear on behalf of another in state court. *See* ***State v. Olexa***, 136 Wis.2d 475, 481, 402 N.W.2d 733, 736 (Ct. App. 1987).

[4] The State has not responded to this claim.

of the right to testify. *See* ***State v. Wilson***, 179 Wis.2d 660, 671-72, 672 n.3, 508 N.W.2d 44, 48 (Ct. App. 1993), *cert denied*, 115 S. Ct. 100 (1994). All that is necessary is that the record support a knowing and voluntary waiver of the defendant's right to testify. *See* ***id.*** at 671-72, 508 N.W.2d at 48.

At the close of the prosecution's case, the trial court informed Knecht of his right to testify in his own behalf and the consequential waiver of his Fifth Amendment privilege. The court further advised Knecht that he was not obligated to prove anything, that the prosecution had the burden of proof, and that in the absence of his testimony, the prosecution could not comment on his failure to testify. The court also went through the available defenses to the nonsupport charges. Although Knecht expressed concerns about how he would present his testimony without an attorney to ask him questions, the court indicated that some leeway would be allowed so that Knecht could just tell his story. Knecht's only inquiry about his right to testify was whether he would be able to address the jury on his theory of the law, presumably his claim that the government lacked jurisdiction to interfere in his family relationship. After the trial court explained that matters of law could not be addressed, Knecht declined to testify.

We reject Knecht's characterization of the exchange about the right to testify as "murky" and "unclear." The trial court gave a sufficient amount of information to Knecht. It was not obligated to advise Knecht on whether he should exercise his right to testify. We conclude that the record establishes a knowing and voluntary waiver.

The final issue is whether the trial court erroneously exercised its discretion at sentencing when it proceeded without a presentence investigation report. Knecht was sentenced to the maximum, a total of eight years' imprisonment for the four counts of nonsupport. A presentence report was not ordered upon the trial court's finding that Knecht would not cooperate in providing information for the report.

Whether to order a presentence report is within the discretion of the trial court. *See* ***Harris v. State***, 78 Wis.2d 357, 371, 254 N.W.2d 291, 298-99 (1977). The record establishes Knecht's aversion to the authority of the court to act in any respect. The finding that a presentence report would have been a meaningless exercise is not clearly erroneous. The trial court properly exercised its discretion in proceeding without a report.[5]

Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was a misuse of discretion. *See* ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). Appellate courts have a strong policy against interference with that discretion. *See* ***id.*** Thus, we begin with the presumption that the trial court acted reasonably and the appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. *See* ***State v. Petrone***, 161 Wis.2d 530, 563, 468 N.W.2d 676, 689 (1991). The three primary

[5] Knecht did not make an offer of proof as to the information he now claims was missing from the sentencing proceeding. We note that his allocution to the court at sentencing included his explanation for the offenses (the inability to pay) and a rendition of his personality traits and lifestyle. We would be hard pressed to conclude that the trial court was uninformed.

factors to be considered are the gravity of the offense, the character of the offender and the need for protecting the public. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984).

Knecht argues that the court placed too much emphasis on his political and social beliefs as a basis for imposing the maximum sentence. We disagree. The trial court focused on Knecht's intentional refusal to acknowledge and pay his child support obligations. The court found that Knecht had no intention of changing his behavior with respect to making payments. Probation was rejected because of the court's familiarity with Knecht's unwillingness to conform to the law. Although Knecht's religious and political beliefs underlie his refusal to pay support, the trial court did not punish Knecht for possessing those beliefs. The offense was deemed substantial because of the substantial amount of money due.

We conclude that the sentence was based on appropriate factors and the facts of record. Imposition of the maximum sentence in these circumstances is not shocking and certainly not without a basis. *See* ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988) (a sentence may be excessive when it shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances).

By the Court.—Judgment and order affirmed.

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