**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1854**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**GILLES GLASSIOGNON,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

EICH, C.J.[1] Gilles Glassiognon appeals from a judgment convicting him of unlawful use of a telephone, as a repeater, in violation of § 947.012(1)(a), STATS.,[2] and from an order denying his motion for postconviction relief. He tried the case to a jury pro se, and he argues on appeal

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] The complaint alleged that Glassiognon made a threatening telephone call to an automobile service center.

that the trial court erred in determining that he had validly waived his right to an attorney. We disagree and affirm the judgment and order.

When Glassiognon made his initial appearance on the charge, on August 24, 1994, he was represented by a public defender and released on a signature bond. Glassiognon did not appear at a pretrial conference on September 7, but was represented by an assistant public defender. A final conference was held on November 9 and, when Glassiognon failed to appear, a bench warrant was issued for his arrest. His attorney telephoned the prosecutor and, based on his representation that Glassiognon was prepared to plead to the charge, the warrant was withdrawn.

Glassiognon appeared, with counsel, at the plea hearing on December 5, 1994, and stated that he had changed his mind and did not wish to plead to the charge, but wished to go to trial instead. At Glassiognon's request, the case was adjourned to a later date. Because Glassiognon appeared to be changing addresses with some frequency, the court asked for his present address and warned him that it was his responsibility to notify the court of any address change. The court also stated it would not postpone the case indefinitely. The case was scheduled for jury trial on March 22, 1995, with the jury to be drawn on March 20.

Glassiognon did not appear on the jury-draw date, apparently having failed to receive the notice because he had moved to another address without informing the court. The case was again set for trial, with the jury to be drawn on May 30, 1995. On that date, Glassiognon's public defender attorney informed the court that his office had re-calculated Glassiognon's financial data and determined that he was not entitled to representation at public expense. Counsel stated that he had discussed with Glassiognon the possibility of proceeding pro se, and that Glassiognon had chosen to do so and "would like to waive his right to a jury trial." Protesting that he was eligible for public defender assistance, Glassiognon asked if he could "go through the process" again to "see if I'm qualified." He said he wanted a lawyer. The court told him to iron it out with the public defender's office immediately and it would review their determination. The court, noting that Glassiognon had "waited until the morning of jury selection to go through this process," advised him: "In the event that you are not eligible for Public Defender representation, then your choice is

to go ahead and either hire an attorney to represent you or represent yourself in this matter."

The public defender's office apparently confirmed its determination of ineligibility and, on June 14, 1995, the court held an "indigency hearing." Again Glassiognon failed to appear.[3] The court began by reciting at length the delays and adjourned hearings characterizing the case since its inception nearly a year earlier and, after reviewing Glassiognon's financial data, ruled that he was ineligible for public defender representation.

Jury selection for Glassiognon's trial was scheduled for July 3, 1995, and he appeared on that date without counsel. After verifying Glassiognon's refusal of the State's earlier plea-bargain offers, the court advised him of the possible penalties he could face should he be found guilty after trial. Acknowledging the "risk" that proceeding to trial pro se presented, Glassiognon stated he was willing "to take that risk" and wanted to go forward because he was "looking for justice [and] ... truth." The court then asked Glassiognon whether he had any questions, which prompted a lengthy discussion about Glassiognon's contacts with the public defender's office and his missed court appearances. In response to another of Glassiognon's questions, the court stated it would instruct the jury that it was to draw no inferences or conclusions from his self-representation and that it would give him "leeway" in the conduct of his defense.

The jury was selected and the trial proceeded a day or so later without further ado. Glassiognon was found guilty and sentenced to ninety days in the county jail.

Again—inexplicably—represented by a public defender, Glassiognon filed postconviction motions in which he sought a new trial, claiming he was denied the right to counsel. The prosecutor, arguing against the motion, stressed that the history of Glassiognon's case was one of misuse of

[3] The court expressly found that Glassiognon had been aware of the indigency hearing and that he understood full well that, despite his protestations, he was not eligible for public defender representation.

the system and delaying tactics on his part, and asked the court to rule that a "constructive waiver" of counsel had occurred.

The court began its discussion of the motion by describing Glassiognon as "a very intelligent man" who, from the very start, "intended to manipulate this entire trial." After detailing the history of the proceedings and the several nonappearances by Glassiognon—noting at one point that "whenever Mr. Glassiognon doesn't want something to occur, he doesn't receive the notices"—the court stated that, while Glassiognon had from time to time said he wanted to be represented by an attorney,

> [w]hat [he] will not say is that he was given every opportunity to retain an attorney. I set this case over at least five times. I gave him between the first trial date in December to [some] ... time in May when he found out that the Public Defender was no longer representing him, until the time that we ultimately had the trial in this case which was ... more than ample opportunity to retain counsel.

The court concluded:

> I believe that Mr. Glassiognon through his conduct ... has waived his right to counsel in ... that his tactics were so [e]gregious and his attitude so uncooperative that there was no sense in going ahead with any further discussions regarding counsel....
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> ....
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> I believe [his] behavior constitutes a waiver and that at some point in time [on] the basis of just being able to try a case and to bring the proceedings to a conclusion, the Court has to say enough is enough, and that was the position that I took.... I think his conduct in this ... case was so egregious that he has through his own behavior waived his right to counsel.

The court denied Glassiognon's motion and this appeal followed.

We agree with Glassiognon that there is nothing in the record from which we could conclude that he expressly waived his right to counsel.[4] The State, apparently conceding the point, confines its argument to one of "constructive waiver," maintaining that, through his actions, Glassiognon must be held to have waived counsel.

In ***State v. Woods***, 144 Wis.2d 710, 715, 424 N.W.2d 730, 732 (Ct. App. 1988), we held that a defendant may be "deemed" to have waived counsel when, as the result of his or her actions, "the orderly and efficient progression of th[e] case [is] being frustrated."[5] Woods, having gone through four appointed attorneys in a pretrial period stretching from December 1984 to October 9, 1986, and, on the latter date, having requested either an adjournment of the trial or appointment of a fifth, was held to have "deemed by his own actions that the case proceed [pro se]." ***Id***. at 715-16, 424 N.W.2d at 732 (emphasis omitted). The

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[4] In ***Pickens v. State***, 96 Wis.2d 549, 563-64, 292 N.W.2d 601, 609 (1980), the supreme court held that

> in order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but *also his awareness of the difficulties and disadvantages of self-representation,* the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found.

(Emphasis added).

The record in this case simply does not meet these standards.

[5] We cited ***State v. Scarbrough***, 55 Wis.2d 181, 197 N.W.2d 790 (1972), for this proposition. In ***Scarbrough***, the supreme court referred to a still earlier case, ***Rahhal v. State***, 52 Wis.2d 144, 148, 187 N.W.2d 800, 803 (1971), where, in commenting on the problems caused by last minute substitutions of defense attorneys in criminal cases, the court stated: "We agree with the majority of federal courts which have repeatedly held the right to counsel cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the administration of justice."

question, we said, was one of discretion, and we concluded that, on the facts before it, "the trial court did not misuse its discretion in trying the case on [the scheduled] day and requiring Woods to proceed *pro se*." ***Id***. at 715, 424 N.W.2d at 732.[6]

The supreme court's recently issued opinion in ***State v. Cummings***, 199 Wis.2d 722, 546 N.W.2d 406 (1996), has been discussed in both parties' briefs. The ***Cummings*** court, after specifically "approv[ing]" our decision in ***Woods***, held, on the facts of the case before it,[7] that the trial court had correctly determined that the defendant had "forfeited his Sixth Amendment right to counsel." ***Id***. at 759-60, 546 N.W.2d at 421. The court went on to state in a footnote that it was "recommend[ing] that trial courts in the future, when faced with a recalcitrant defendant," follow four specific steps set forth in the dissenting opinion "before determining that a defendant has forfeited his or her right to counsel." ***Id***. at 757 n.18, 546 N.W.2d at 420.[8] Because ***Cummings*** was

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[6] Without referring to our holding in ***Woods***, we held in ***State v. Haste***, 175 Wis.2d 1, 30-32, 500 N.W.2d 678, 689-90 (Ct. App. 1993)—on what appears to have been an equally egregious set of facts, and without considering the discretionary nature of the trial court's determination—that the defendant had not waived his right to counsel.

[7] The ***Cummings*** majority does not discuss in any detail the facts leading up to that determination. It notes only that the defendant had gone through several court-appointed attorneys and, while never actually requesting them to withdraw, "he consistently refused to cooperate with any of them and constantly complained about their performance." ***Cummings***, 199 Wis.2d at 754, 546 N.W.2d at 418-19. Other than that reference, the court states simply: "There can be no doubt from the record that [the defendant]'s behavior was manipulative and disruptive and that his continued dissatisfaction was based solely upon a desire to delay." ***Id***.

[8] The "four steps" are:

> (1) explicit warnings that, if the defendant persists in ... [specific conduct] the court will find that the right to counsel has been forfeited and will require the defendant to proceed to trial pro se; (2) a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) a clear ruling when the court deems the right to counsel to have been forfeited; [and] (4) factual findings to support the court's ruling ....

***Cummings***, 199 Wis.2d at 765, 546 N.W.2d at 423 (Geske, J., dissenting).

decided after Glassiognon's trial—and because the court's "in the future" language indicates an intention that it not apply retroactively—we think the case is of little value here.

The issue becomes, then, whether the trial court erroneously exercised its discretion when it concluded that Glassiognon had, by his conduct, "waived" or "forfeited" his right to counsel.

We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the [trial] court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "Where the record shows that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). "Indeed, we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39.

We have sometimes said that the trial court's discretionary authority constitutes "a limited right to be wrong" in that its discretionary determinations are not tested by some subjective standard—or even by our own sense of what might be a "right" or "wrong" decision in the case—but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995) (quoting M. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 176 (1979)).

We have set forth the basis for the trial court's ruling—as explained both at trial and at the postconviction motion hearing—at some length. We are satisfied that explanation is more than adequate to establish that the court "`under[took] a reasonable inquiry and examination of the facts,'" and because "`the record shows ... a reasonable basis for the ... court's determination,'" we are bound to uphold that determination as a sustainable exercise of discretion, regardless of whether we would rule the same way in the first instance. ***Burkes***, 165 Wis.2d at 590-91, 478 N.W.2d at 39 (quoted source omitted).

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

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