

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 96-3015

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESUS BARBARY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

VERGERONT, J.¹ Jesus Barbary appeals from a judgment of conviction for carrying a concealed weapon in violation of § 941.23, STATS., and possession of THC in violation of § 161.41(3r), STATS., and from the sentence

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

imposed: three years probation for each count, concurrent, with various conditions. Barbary argues that the trial court erred in failing to appoint counsel based on indigency; in failing to determine that he was incompetent to stand trial under § 971.13, STATS.,² or to represent himself; in numerous rulings before and during trial; and in imposing sentence. He also contends that his right to trial by an impartial jury of his peers was violated because of the composition of the jury pool. We conclude that the trial court did not erroneously exercise its discretion in failing to appoint counsel at the county's expense. Based on the record before us, we cannot conclude that the trial court erroneously exercised its discretion in not ordering a competency exam or in not appointing counsel because of Barbary's incompetency. Finally, for the reasons we explain below, we are unable to review the remaining issues. We therefore affirm the judgment of conviction and the sentence.

In response to Barbary's motion for free transcripts, on May 22, 1997, we ordered the preparation of the transcript of the hearing at which Barbary was found not indigent in order to review the trial court's denial of Barbary's request for free transcripts. The circuit court prepared and filed with this court

² Section 971.13, STATS., provides:

Competency. (1) No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

(2) A defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency.

(3) The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

transcripts of the September 16, 1996 hearing at which the trial court denied Barbary's motion for appointed counsel, and of the January 15, 1997 hearing at which the trial court denied the motion for free transcripts. After reviewing those transcripts, we concluded in an order dated July 11, 1997, that the trial court's determination that Barbary was not indigent was not clearly erroneous and we therefore denied his request for free transcripts. In addition to the other arguments raised on appeal, Barbary contends that our decision denying free transcripts was in error because he is indigent. We decline to modify that decision because Barbary has not presented us with any material or argument we have not already considered. However, because of Barbary's understandable confusion over various determinations of indigency that he views as inconsistent, we will further explain our decision on the transcript fee.

Courts make determinations of indigency for various purposes—waiver of filing fee in the trial court in civil cases; appointment of counsel at county expense when the public defender's office has found a criminal defendant to be ineligible for its services; waiver of filing fee in the court of appeals for civil and criminal appeals; waiver of transcript fee for civil and criminal appeals. There is no uniform standard for indigency in all these contexts, and the determination in each instance depends on the specific facts presented to the decision maker.

It is apparently the case that one or two other trial courts have determined that Barbary is indigent for purposes of waiving the filing fee in civil cases. However, as the trial court in this case correctly pointed out when that was brought to its attention at the hearing on Barbary's request for free transcripts, those judges may have had different information before them. For example, in denying Barbary's request, this trial court had before it additional information

presented at the trial in this case about Barbary's ability to pay expenses incurred in traveling for an organization with which he is involved.

Barbary also accurately states that this court waived the appellate filing fee in this case based on the affidavit he submitted to the clerk of the court of appeals. However, the letter waiving the filing fee specifically states: "This order waives only the filing fees in the court of appeals. It is not a determination of indigency for any other purpose. Indigency may be reevaluated if a request is received for waiver of other fees based on indigency." The procedure for waiving the filing fee in the court of appeals is addressed in WIS. CT. APP. IOP IV-13 (January 1, 1996).

However, when a request is made for a free transcript for an appeal, the case law and statutes mandate a different procedure. The trial court first hears the request for a waiver of transcript fees for an appeal. *See State v. Jacobus*, 167 Wis.2d 230, 232, 481 N.W.2d 642, 643 (Ct. App. 1992). When the trial court's denial is challenged, we do not make our own determination of indigency based on a new record. Rather, we review the trial court's decision to determine whether the trial court's determination that the appellant is not indigent is clearly erroneous. *See Jacobus*, 167 Wis.2d at 234, 481 N.W.2d at 643. Applying this standard of review, we have concluded the trial court did not make an erroneous determination that Barbary is not indigent and that is the reason we denied Barbary's request for free transcripts.

After we denied the request for free transcripts, the parties filed their briefs, but Barbary did not file any transcripts. The only transcripts in the record are the transcripts from the two hearings we have already described. Our review is confined to those parts of the record made available to us. *State v. Pettit*, 171

Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). The appellant has the burden to provide the court with the record necessary to review the issues raised. *See State Bank of Hartland v. Arndt*, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). In the absence of an incomplete record, we assume the facts necessary to sustain the trial court's decision. *Id.*

Without the trial's transcript, we are unable to review any of the errors that Barbary claims occurred at trial. Without a transcript of the sentencing proceeding, we are unable to review Barbary's challenge to the sentence. Barbary's claim of error with regard to numerous pretrial rulings is limited to a list of errors, with no developed argument, no citation to the record, and no transcripts of the pretrial proceedings, if there were any. For these reasons, we do not address the pretrial rulings. For the same reason, we do not address the challenge to the jury pool: Barbary has not developed the argument beyond one sentence and there is nothing in the record from which we can determine the racial composition of the jury pool, the jury that was selected to hear Barbary's case, or the procedure for selecting the jury pool or the jury that heard Barbary's case.

Because the record does contain the transcript of the hearing on the court's denial of Barbary's motion for the appointment of counsel, we are able to review that determination. We conclude that the record supports the trial court's determination that Barbary was able to hire counsel.

The complaint charged Barbary with possession of THC, possession of a concealed weapon, and possession of drug paraphernalia. Soon after the criminal complaint was filed, Barbary, acting pro se, filed a motion requesting the appointment of an attorney at county expense because of his indigency. Accompanying the motion was an affidavit showing that Barbary had been

determined ineligible by the public defender's office. The affidavit stated that Barbary had a vehicle with an equity value of \$500, a monthly budget of \$880, and debts of approximately \$4,100—to the unemployment compensation fund, American Family Insurance, IRS penalty, physician and chiropractic bills and Visa. A \$20 monthly payment was being made on the Visa bill. The affidavit stated that there was one failed attempt to secure legal counsel and stated the name of one attorney, with the retainer and hourly rate blank but with the statement that that attorney would not represent Barbary if appointed by the court.

At the hearing on this motion, Barbary represented himself and argued that although the public defender's office had found him ineligible for the appointment of a public defender, he could not afford to hire an attorney. He stated that his disability benefits of \$848 per month were just enough to pay for his rent and food and other necessary expenses; he had just filed for bankruptcy; his money was tied up in a dispute over his unemployment compensation benefits, and he had an additional bill from an attorney of \$5,081, apparently resulting from a determination that a defamation suit Barbary filed was frivolous. Barbary stated that he had been found indigent by another trial court, by the Court of Appeals, and by the federal bankruptcy court. Barbary disputed the public defender's method of determining indigency because they did not take into account all the expenses he listed.

An attorney from the public defender's office was present and explained how the office determined that Barbary was ineligible for its services under its guidelines. One-quarter of the equity value of the vehicle, or \$125, was added to four months of income. The resulting total of \$3,517 was compared to \$2,216, the cost of living allowance for four months for a family size of one. Barbary's medical bills and an unemployment compensation overpayment were

not considered because he was not making monthly payments. Based on this method, the public defender's office concluded that over a four-month period Barbary had \$1,301 available to pay for an attorney and that was over the amount the public defender tables showed for the cost of counsel for a misdemeanor case.

The trial court asked Barbary what effort he had made to hire a lawyer. Barbary answered that before these charges were filed he contacted lawyers regarding civil cases, and they told him that since he was on social security he did not have any income "and the case is a cut and dry case for no victory. They couldn't handle my case so it was futile to go back to them." Barbary stated that since they did not want to handle his civil cases because of his lack of funds, it did not make sense to ask them to handle this criminal matter.

The court denied Barbary's request for appointed counsel at the county's expense. The court determined that Barbary did have income available in the amount of \$848 per month in after-tax dollars, that it was familiar with what lawyers charge in the area, and that Barbary had the ability to afford counsel for a misdemeanor. The court stated that, although Barbary had bills, an attorney to represent him in this matter was probably more important than those bills and he should consider hiring a lawyer rather than paying those bills.

An indigent defendant has a constitutional right to the appointment of counsel. *State v. Pirk*, 175 Wis.2d 503, 505-06, 499 N.W.2d 280, 281 (Ct. App. 1993). This right is not defined by the public defender's indigency criteria. *Id.* If a defendant in a criminal case does not meet the criteria for appointment of a public defender, the trial court must nevertheless determine whether the defendant is indigent, and appoint counsel if he or she is indigent. *Id.* In making this determination, the trial court cannot restrict itself to the public defender's

criteria but should consider all relevant evidence presented by the defendant that is material to the defendant's present ability to retain counsel. *State v. Dean*, 163 Wis.2d 503, 514, 471 N.W.2d 310, 315 (Ct. App. 1991). The court must also disregard the public defender's tables for the cost of retaining counsel and consider the fees charged by local private counsel in similar cases. *Id.*

The defendant has the burden of proving indigency by a preponderance of the evidence. *Id.* at 513, 471 N.W.2d at 314. Whether the defendant has the financial means to obtain counsel is a question of fact. *Id.* Whether the facts require the appointment of counsel is left to the sound discretion of the court. *Id.* at 514, 471 N.W.2d at 315. The defendant must present the court with evidence of his or her assets, income, liabilities, and attempts to retain counsel. *Id.* The trial court need not conduct an independent inquiry but must ask enough questions so that the court can decide the question of indigency or order the defendant to report further to the court on the issue of indigency. *Id.* The trial court must decide whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. *Id.*

The trial court had before it the relevant information of Barbary's income, assets and liabilities. It also was aware of and considered the prevailing rates in the community for a misdemeanor. It did not rely on the determination of the public defender or simply apply the public defender guidelines. *Pirk*, 175 Wis.2d at 505, 499 N.W.2d at 281. Barbary did not present evidence of unsuccessful attempts to retain private counsel for the misdemeanor charges. His testimony on his reasons for not doing so does not require a finding that such attempts would be futile, since the cost of private counsel in the civil cases Barbary referred to may bear no relation to the cost of representation on the misdemeanors. And, the record does not indicate that Barbary made unsuccessful

attempts to retain counsel after the court's decision. We conclude that the record supports the court's determination that Barbary could afford counsel and the court did not erroneously exercise its discretion in declining to appoint counsel.

We now turn to Barbary's claim regarding his competency. He claims that the trial court should have conducted a competency hearing under § 971.14, STATS., and should have appointed counsel because he was not competent to represent himself. We have carefully reviewed the record and conclude that, based on the record before us, we cannot say that the trial court erroneously exercised its discretion in either respect.

At the hearing on appointment of counsel, which we have described above, Barbary did not argue that he was incompetent either to represent himself or incompetent for purposes of § 971.13, STATS. Based on the transcript of that proceeding, we see nothing that raises a doubt about his competency to proceed.

The record shows that Barbary, again pro se, filed a motion on October 23, 1996, asking that his trial be postponed because of plans he had previously made involving a religious mission and because he had appealed the court's denial of his request for appointment of counsel.³ The minute sheet on the November 15, 1996 hearing shows the request for a continuance was denied. Neither the motion nor the minute sheet of the hearing mentions Barbary's competency. A note dated November 15, 1996, states that "the attached

³ Barbary filed a notice of appeal of the court's decision denying appointment of counsel on October 11, 1996. In orders on other procedural matters, we expressed our concern that the order appealed from was not final and therefore not an appeal of right under § 808.03(1), STATS. However, Barbary filed a notice of appeal from the judgment and conviction on December 3, 1996, clearly an appeal of right, and that properly brought before this court all prior nonfinal orders. The issue of the appealability of the indigency determination therefore became irrelevant.

documents were shown to the judge but not offered or received as exhibits.” These documents refer to chest pains Barbary was experiencing shortly before November 15. In a letter from Barbary to the court dated November 16, 1996, Barbary states he informed the court he “had health problems and was incompetent” pursuant to § 971.13, STATS., at the hearing on the preceding day. The letter also says that the trial court erred by not conducting a competency proceeding pursuant to § 971.14, STATS., “since there is knowledge of Defendant Barbary’s mental disorder disability and recent health problems. See enclosed EX. V medical forms.” There are no medical forms attached to the letter.

A jury trial was scheduled for November 25, 1996. On November 20, 1996, Barbary, pro se, filed a request for a substitution of judge, which was denied as untimely that same day. Also on November 20, 1996, Barbary filed, pro se, a request for a preliminary examination. The record does not disclose the resolution of this motion, but apparently it was denied. We note that the charges against Barbary were misdemeanors, and a preliminary examination is required by statute only for a felony. *See* § 970.03(1), STATS. On November 21, 1996, Barbary filed a request for postponement of the trial on the ground of incapacity to proceed. He attached a statement from William Sullivan, M.D., dated November 20, 1996, that stated:

TO WHOM IT MAY CONCERN:

Mr. Jesus Barbary has been under my care since 1/30/95

He is being treated for 1. Bipolar Affective Disorder 2. Generalized Anxiety

These are currently aggravated by stress with increased physical pain in his left shoulder and arm.

We are requesting postponement of hearings until at least 1/20/97.

The minute sheets from November 25, 1996, state that “Barbary addresses court re: physicians & medication. Request denied.” The minute sheets show that the trial took place on November 25, 1996, with Barbary representing himself, voir diring the jurors, making an opening statement, cross-examining the State’s witness, testifying himself, presenting witnesses, and making a closing statement. The minute sheets show that at various points the court explained procedures and Barbary’s rights to him. The jury returned a guilty verdict on the concealed weapon and THC charges and a not guilty verdict on the drug paraphernalia charge.

It is not clear from the record whether Barbary was requesting only a fixed-term postponement in the trial due to health problems that were expected to improve or was requesting that the trial not proceed at all because he was not competent under § 971.13, STATS. On appeal he appears to make only the latter argument.⁴ Whether or not Barbary requested a competency determination under § 971.14, STATS., the court “shall proceed under [§ 971.14] whenever there is reason to doubt a defendant’s competency to proceed.” Section 971.14(1). “A person is incompetent to proceed if he or she “lacks substantial mental capacity to understand the proceedings or assist in his or her own defense.” Section 971.13(1). Section 971.14(2) requires that the court appoint an examiner to perform a competency examination and report to the court, after certain conditions in § 971.14(1) are met. “Reason to doubt” a defendant’s competency may be

⁴ If Barbary does intend to challenge on appeal the court’s determination not to grant a continuance because of a temporary health problem, that is a discretionary determination which we reverse only if the trial court erroneously exercised its discretion. See *Robertson-Ryan v. Pohlhammer*, 112 Wis.2d 583, 587, 334 N.W.2d 246, 249 (1983). The incomplete record does not permit us to conclude that the trial court erroneously exercised its discretion in denying the request for a continuance.

raised by the defendant's colloquies with the court or courtroom demeanor, as well as by a motion setting forth grounds. *State v. Debra A.E.*, 188 Wis.2d 111, 139, 523 N.W.2d 727, 754 (1994). However, before the defendant's competency at the time of the proceedings is determined, there must be some evidence raising doubt as to his or her competence or a motion setting forth grounds for the belief that competency is lacking. *State v. McKnight*, 65 Wis.2d 582, 595, 223 N.W.2d 550, 557 (1974). A 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's decision was clearly erroneous. *State v. Garfoot*, 207 Wis.2d 215, 224, 558 N.W.2d 626, 630 (1997).

We cannot say on the record before us that the trial court erroneously exercised its discretion in not ordering a competency examination or made a clearly erroneous determination in not doing so. Dr. Sullivan's statement is evidence that Barbary suffers from bipolar disorder and we will assume that this diagnosis is the basis for the disability benefits Barbary receives.⁵ But that diagnosis is not necessarily evidence that there is reason to doubt Barbary's competency to stand trial. The language of § 971.13(2), STATS., itself indicates that this is so because it expressly states that a "defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency." Moreover, the judicial council

⁵ Barbary has attached to his brief a disability report dated August 21, 1995, in which Dr. Sullivan diagnoses Barbary as having Bipolar I disorder and paranoid personality disorder and concludes that he is unable to function in any type of structured employment activity. This is not contained in the trial court record and there is no stamp on the report indicating that it was filed in the trial court. However, whether this was presented to the trial court does not affect our decision.

committee note states: “competency is a judicial rather than a medical determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant’s capacity to assist counsel and make decisions which counsel cannot make for him/her. ...” Judicial Council Committee’s Note, 1981, § 971.13(1), STATS.

The record indicates that Barbary is capable of presenting coherent and pertinent argument on the issues before the court and making written presentation and motions that are understandable. He also shows some knowledge and understanding of the legal process. In the absence of other evidence, or a more complete record that shows otherwise, we must conclude that the trial court did not have before it evidence that was sufficient to create a reason to doubt Barbary’s competency to proceed under § 971.13, STATS.

Barbary also argues that the court had an obligation to appoint counsel for him at county expense because he was incapable of representing himself. Barbary is not claiming that the trial court interfered with his right to retain private counsel—for example by denying a continuance to permit him to retain one. The record does not show any efforts by Barbary to retain private counsel, nor any desire by Barbary to do so. Barbary is also not claiming that he did not knowingly, intelligently and voluntarily waive his right to have privately retained counsel represent him. Rather, his argument is that he is entitled to free counsel because he is incapable of representing himself. We have already decided that the trial court properly exercised its discretion in finding Barbary not indigent for purposes of the appointment of county-funded counsel.⁶ We are unaware of

⁶ Barbary does not contend that the public defender’s office erroneously applied their guidelines or applied unauthorized guidelines.

any constitutional or statutory requirement that a court appoint free counsel for a nonindigent criminal defendant because he or she is incapable of representing himself or herself at trial. We assume for purposes of discussion that it would be a constitutional violation for a court to permit a nonindigent criminal defendant (who is competent to stand trial) to represent himself or herself at trial if he or she is incapable of doing so. This does not necessarily mean, however, that the court must appoint counsel at county expense. The court could, for example, appoint counsel and order the defendant to pay for such counsel; or the court could postpone the trial and order the defendant to make efforts to retain counsel. We put aside for the moment the fact that Barbary did not want and does not want either of these results, and look at the issue of his competency to represent himself.

In the recent decision, *State v. Klessig*, ___Wis.2d ___, 564 N.W.2d 716, 724 (1997), the court held that there is a higher standard of competency for determining whether a defendant is competent to represent himself or herself than for determining whether a defendant is competent to stand trial under § 971.13, STATS. The court reached this decision in the context of a challenge to a conviction after a trial the defendant stated he wished to proceed without an attorney appointed by the public defender's office. He was permitted to do so by the court, but later contended that his waiver of the right to counsel was not knowing, intelligent and voluntary. *Id.* at ___, 564 N.W.2d at 719. The supreme court stated that the higher standard for measuring competency to represent oneself was based on its own legal policy analysis rather than on the requirements of the Sixth Amendment, which guarantees the right to the assistance of counsel. *Id.* at ___, 564 N.W.2d at 724. The supreme court mandated that the court conduct a colloquy in every case where a defendant seeks to proceed pro se to

prove knowing and voluntary waiver of the right to counsel. *Id.* at ____, 564 N.W.2d at 721.

The colloquy must 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. *Id.* In making a determination of competency, the circuit court should consider factors such as the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury. *Id.* at ____, 564 N.W.2d at 724. This competency determination should not prevent persons of average ability and intelligence from representing themselves unless a specific problem or disability may prevent a meaningful defense from being offered, should one exist. *Id.* The determination rests to a large extent on the judgment and experience of the trial judge, and on appeal we uphold the trial court's determination that a defendant is or is not competent to represent himself unless totally unsupported by the facts of record. *Pickens v. State*, 96 Wis.2d 549, 569-70, 292 N.W.2d 601, 611 (1980).

We will assume without deciding that the requirements of *Klessig* apply in this case. The minute sheets show that the trial court did consider, before the trial, the statement from Barbary's physician that Barbary was diagnosed with a bipolar disorder. Barbary's letter to the court dated November 16, 1995, also contained information about his physical and mental health. There were at least two proceedings—one on November 15, 1995, and one on November 25, 1995, just before trial—on Barbary's motions for continuance. The trial court had the opportunity to observe Barbary in pretrial proceedings and read his pretrial filings.

Because we do not have the transcripts of the proceedings in which the court ruled that the trial should proceed, we must assume this would support the trial court's implicit decision that the trial should proceed with Barbary representing himself. More specifically, we must assume that the missing portions of the record, including the transcripts of the trial, would support a determination that Barbary was competent to represent himself and that there was a valid waiver of his right to be represented by counsel which, as a nonindigent defendant, he would have to retain. Nothing in the record that we have before us indicates that the trial court's decision that Barbary was competent to represent himself was an erroneous exercise of the trial court's discretion.

By the Court.—Judgment affirmed.

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

