

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2006

Cornelia G. Clark
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 No. 2005AP1141-CR

Cir. Ct. No. 2003CF102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. BLOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian Block appeals a judgment convicting him of armed robbery and an order denying his motion to proceed pro se. Block argues the circuit court erroneously exercised its discretion when it denied his request to

represent himself at trial. We agree, reverse the judgment and order, and remand for a new trial.¹

BACKGROUND

¶2 On February 21, 2003, Block was charged with armed robbery as a repeat offender. Block pled not guilty and a trial date was set. Prior to trial, Block's appointed counsel moved to withdraw, which the circuit court allowed. Block informed the circuit court that he did not want substitute counsel appointed because he believed he could more adequately represent himself. The court engaged Block in a colloquy in which it elicited that Block understood he faced twenty-five years in prison, that he had not previously represented himself in five prior cases, and that he completed high school and one year of college. Block indicated he wished to exercise his constitutional right to represent himself.

¶3 The court informed Block that it had to determine if he was adequately able to represent himself. It stated:

I must make that assessment, because to not do so risks making a mockery of the process; and, quite frankly, there are other considerations here, not the least of which is the fact that there are constitutional rights at risk for the victim as well, constitutional level rights.

....

And to go through a trial where somebody professes to be able to represent themself[ves], only to not do it adequately, and thereby set up a handmade appeal and then force the victim to go through it again is one of the constitutional

¹ Block requests a new trial as his remedy and does not contend that there was insufficient evidence to support his conviction. Accordingly, we do not consider whether a remand for trial violates his right to be free from double jeopardy. See *State v. Sarnowski*, 2005 WI App 48, ¶16 n.2, 280 Wis. 2d 243, 694 N.W.2d 498.

rights that I have to balance against your right to represent yourself, as one example of what I must weigh, and the nature of the charges, the seriousness of the charges, the potential jeopardy, all of those things come into play, along with your own ability to adequately understand, to, first of all, identify the legal issues that might exist, to understand the law that might apply in terms of jury instructions and evidentiary questions that would come up during the trial, it's a very, very rare person that can do that adequately under the law.

¶4 The court ordered substitute counsel be appointed. It also ordered Block to cooperate with counsel and indicated it might later consider converting the representation to standby counsel. Block was represented at trial by appointed counsel and was convicted.

¶5 Prior to sentencing, Block filed a motion again asking to represent himself. The court granted Block's motion and appointed Block's trial counsel as standby counsel to assist Block in preparing for the sentencing hearing. The court noted at that time,

for the record, Mr. Block is certainly an intelligent person, that's obvious to the Court, that never was really the issue, it really had to do much more with the Court's concerns about his understanding of the law and procedures that would be necessary to conduct a jury trial, not whether he is intelligent enough to appreciate and to make certain arguments on his own behalf.

¶6 Block represented himself at sentencing. Block also proceeded pro se on appeal, filing a postconviction motion in which he argued the circuit court erred by denying his request to represent himself at trial. The circuit court denied Block's motion, concluding that if it had allowed Block to represent himself at trial, he

would have been proceeding with trial preparation and presentation of matters and strategies that were not legally admissible, resulting in, in great likelihood, either a mistrial or the necessity of having to try this case again. It would

have been contrary to the interest of the public, to the victim and, frankly, to Mr. Block in that he would have not been able to competently represent himself

STANDARD OF REVIEW

¶7 Whether a defendant is denied the constitutional right to self-representation involves a question of constitutional fact. *State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). We sustain the circuit court’s factual findings unless clearly erroneous. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. However, whether the facts satisfy the constitutional standard is a question of law that we review independently. *See id.*

DISCUSSION

¶8 Both the United States Constitution and the Wisconsin Constitution guarantee a defendant the right to conduct his own defense. *See* U.S. CONST. Amend. VI; *Faretta v. California*, 422 U.S. 806, 819 (1975); WIS. CONST. art. I, § 7 (“In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel.”). When a defendant wishes to proceed pro se, the circuit court must determine that the defendant has satisfied two conditions: (1) the defendant has “knowingly, intelligently and voluntarily waived the right to counsel” and (2) the defendant “is competent to proceed pro se.” *Klessig*, 211 Wis. 2d at 203-04.

If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel. However, if the defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself.

Id.

¶9 To determine whether a defendant has met the first condition, a knowing, intelligent and voluntary waiver of counsel, the court must conduct a personal colloquy with the defendant to determine whether the defendant made a deliberate choice to proceed without counsel, was aware of the difficulties and disadvantages of self-representation, was aware of the seriousness of the charge and was aware of the range of penalties that could be imposed. *Id.* at 206.

¶10 The court must also determine that the defendant is competent to proceed pro se. When assessing whether this second condition is met, the court should consider factors such as education, literacy, fluency in English and any disability that might significantly affect the defendant's ability to communicate a defense to the jury. *Id.* at 212.

¶11 Block argues the court's findings demonstrate that he met both *Klessig* conditions and, therefore, should have been allowed to represent himself at trial. Block contends the court improperly demanded more than *Klessig* requires when it balanced his constitutional rights against those of the victim and insisted he demonstrate legal acumen by articulating his defense.

¶12 The record shows that Block made a deliberate choice to proceed pro se and that the court engaged Block in a colloquy in which it confirmed he was aware of all the necessary factors to constitute a knowing, intelligent and voluntary waiver of counsel. Thus, Block satisfied the first condition.

¶13 The circuit court also ascertained the factors pertaining to whether Block was competent to proceed pro se. It acknowledged Block's apparent intelligence, but noted he was "not learned in the law." However, legal knowledge is not relevant to determining competence. "[P]ersons of average ability and intelligence are entitled to represent themselves" and a request to do so "should be

denied only where a specific problem or disability can be identified” *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980), *overruled on other grounds* by *Klessig*, 211 Wis. 2d 194. Thus, the circuit court’s findings, which only question Block’s legal knowledge, indicate Block was competent to represent himself and satisfied the second condition.

¶14 Having established that he knowingly, intelligently and voluntarily waived his right to counsel and was competent to represent himself, Block has established his constitutional right to represent himself at trial. The State does not challenge that Block met the two conditions for self-representation. Instead, the State argues that the circuit court did not actually deny Block’s request to represent himself at trial and, therefore, Block’s right to self-representation was not violated.

¶15 The State contends, “It is clear from the transcript that the court suspected that Block’s planned trial strategy was in whole or in part legally impermissible.” Therefore, the State argues, the circuit court reasonably crafted a compromise that addressed the court’s concerns about Block’s trial strategy, while at the same time respecting his right to self-representation, when it ordered replacement trial counsel be appointed but allowed for Block to later convert the representation to standby counsel. Because Block made no attempt to discharge or reduce the role of his successor counsel, the State asserts, the court did not impair his right to self-representation. We are unpersuaded. While the circuit court may have attempted to reach a compromise, its order raised additional obstacles to Block exercising his constitutional right to self-representation, beyond those required by *Klessig*. Thus, regardless of intent, the effect of the court’s order was to deny Block his right to represent himself, despite having met the two *Klessig* conditions.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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

