COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1716-CR **Cir. Ct. No. 1994CF940760**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Reserve Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. James A. Smith appeals from a judgment of conviction for armed robbery and from a postconviction order summarily denying his motion for a new trial. The issues are: (1) whether the trial court erred by allowing the trial to proceed as Smith defended himself *pro se* and without

appointing standby counsel; and (2) whether the trial court lacked personal jurisdiction over Smith because it never held an arraignment. We conclude that: (1) the trial court informed Smith of his options, and Smith's conduct constituted a waiver of his right to counsel when he refused to withdraw his demand for a speedy trial, which could not have been accommodated had another successor or standby counsel been appointed; and (2) the trial court's failure to hold an arraignment was a harmless not a jurisdictional error, for which Smith has not shown prejudice. Therefore, we affirm.

¶2 Smith was arrested for the armed robbery of an elderly stroke victim. Assistant State Public Defender Stephen A. Sargent was appointed to represent Smith at the preliminary hearing; Smith was bound over for trial. At Smith's next hearing, the trial court inquired about an arraignment, to which the assistant district attorney mistakenly replied that she thought that Smith had already been arraigned, so no arraignment occurred. The remainder of that hearing concerned Attorney Sargent's request for the appointment of successor counsel because of Smith's dissatisfaction with his representation. The trial court told Smith that "the next attorney you get will have to be the one that represent[s] you whether you like it or not. Okay." Smith responded, "I don't want an attorney. I'll represent myself." At that time, Attorney Sargent told the trial court that successor counsel would be appointed. Smith replied, "[n]o. I do not want [the public defender's] office to supply me with an attorney. I will represent myself. I feel I'm smart enough and I [have] been through the system. I know procedures and everything. I should be able to." The trial court warned Smith that he was "charged with a very serious crime." Smith replied that he had no confidence in the state public defender's office. The trial court then explained that it may take some time to appoint successor counsel, to which Smith retorted, "I have a speedy trial

[demand]." Smith continued, "I'm not asking for a different lawyer." The trial court then reviewed Smith's educational background and his experience in the judicial system.

¶3 The state public defender appointed Attorney Thomas G. Wilmouth, who was able to accommodate Smith's speedy trial demand. Three weeks before Smith's scheduled jury trial, Attorney Wilmouth asked to withdraw because Smith was also dissatisfied with his representation. Smith clarified that if Attorney Wilmouth were allowed to withdraw immediately, Smith could then commence representing himself, knowing that he could not represent himself while he was represented by counsel. Smith then prepared to proceed to trial *pro se*.

¶4 On the day of trial, Smith moved for the appointment of another successor counsel. The trial court informed Smith that it would allow him to renew his request for another successor counsel, if he would necessarily waive his speedy trial demand. Smith refused. By knowingly choosing the frequently inconsistent courses of action he did (by repeatedly requesting to discharge counsel and appoint successor counsel at the eleventh hour, by seeking to proceed *pro se*, and by refusing to waive his speedy trial demand), Smith essentially elected to defend himself at his jury trial.

¶5 The jury found Smith guilty of armed robbery, contrary to WIS. STAT. § 943.32(1)(a) (1993-94). The trial court imposed a fifteen-year sentence (five years less than that recommended by the prosecutor).

¶6 Postconviction/appellate counsel, Robert A. Kagen, was appointed for Smith. Attorney Kagen filed a direct appeal, but then withdrew from Smith's representation, and Smith voluntarily dismissed his direct appeal ("***Smith I***"). Then Smith *pro se* filed a notice of appeal and raised the identical issues he now

raises (compelled self-representation, and the absence of personal jurisdiction).[1] We affirmed the judgment on direct appeal, rejecting Smith's issues. *See* ***State v. Smith***, No. 95-1967-CR, unpublished slip op. at 3-4 (Wis. Ct. App. May 29, 1996) ("***Smith II***").

¶7 More than seven years later, we reinstated Smith's appellate rights. *See* WIS. STAT. RULE 809.30 (2003-04).[2] We held that Smith did not waive his right to appellate counsel. *See* ***State ex rel. Smith v. Berge***, No. 03-0808-W, unpublished slip op. (WI App July 17, 2003). Incident to that order, we also dismissed Smith's then pending appeal, ***State v. Smith***, No. 03-1106.

¶8 The state public defender appointed postconviction/appellate counsel, who filed the current direct appeal ("***Smith III***"). Smith raises substantially similar issues and arguments to those he raised in ***Smith II***, however we do not consider ***Smith II*** as the law of the case, as urged by the State, because we reinstated Smith's postconviction/appellate rights.[3]

¶9 Smith challenges the trial court's failure to appoint another successor counsel or standby counsel. Smith was dissatisfied with two appointed counsel. The trial court offered to again allow Smith to contact the state public defender to request the appointment of yet another successor counsel; however, by doing so the trial court would have to adjourn Smith's jury trial, which was scheduled to start that very same day. The trial court asked Smith if he would be willing to

[1] Smith also claimed that his right to a speedy trial was violated.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] In ***Smith III***, he did not pursue an alleged violation of his speedy trial rights.

waive his demand for a speedy trial to accommodate his request for the appointment of yet another successor counsel. Smith refused to waive his speedy trial demand.

¶10 Considering these circumstances, the trial court decided to start the jury trial as scheduled. *See* ***State v. Woods***, 144 Wis. 2d 710, 714-16, 424 N.W.2d 730 (Ct. App. 1988) (a defendant may waive his right to counsel by his conduct); *see also* ***State v. Cummings***, 199 Wis. 2d 721, 757-58, 546 N.W.2d 406 (1996). By electing to place the trial court in this predicament, by asserting mutually exclusive constitutional rights (one of which was clearly more important to him than the other), Smith waived his right to counsel by operation of law. *See* ***Woods***, 144 Wis. 2d at 716.

¶11 Smith also contends that because he was never arraigned, the trial court had no personal jurisdiction over him. "Personal jurisdiction in a criminal case attaches by an accused's physical presence before the court pursuant to a properly issued warrant, a lawful arrest or a voluntary appearance, and continues throughout the final disposition of the case." ***Kelley v. State***, 54 Wis. 2d 475, 479, 195 N.W.2d 457 (1972). Consequently, the trial court had personal jurisdiction over Smith. Smith was not arraigned. He objected on that basis on the second day of his jury trial. He alleged no prejudice then, and we know of none. If the defendant has not shown prejudice from the absence of an arraignment, that error is harmless. *See* ***State v. Martinez***, 198 Wis. 2d 222, 235-36, 542 N.W.2d 215 (Ct. App. 1995).

By the Court.—Judgment and order affirmed.

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