

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 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. 2006AP666

Cir. Ct. No. 2003CF119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENE P. GANTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dodge County: JOHN R. STORK, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Gene Ganta appeals a judgment convicting him of a second or subsequent offense of cocaine possession and an order denying his motion for a new trial. The issue on appeal is whether Ganta validly waived his right to counsel. We conclude that he did and therefore affirm.

BACKGROUND

¶2 At his initial appearance, Ganta was represented by a state public defender (SPD), who informed the court that he was making a special appearance because it did not appear that Ganta would qualify for SPD representation. The SPD informed the court that Ganta had received a copy of the charging document and had reviewed it. Ganta personally informed the court that he had read the charges and understood them, and thought that the potential penalties were “pretty steep.” The court adjourned the hearing and appointed Attorney James Mack to represent Ganta.

¶3 At the preliminary hearing, Ganta informed the court that he wished to proceed *pro se* with standby counsel because he had not yet had the opportunity to consult with Mack, and thought it would be easier to ask questions himself than to relay them to counsel first. The court allowed Ganta to represent himself at the hearing with Mack acting as standby counsel. The court subsequently allowed Mack to withdraw due to Ganta’s dissatisfaction with him, and appointed Attorney Karl Green as successor counsel.

¶4 At a status hearing about a month before trial, Ganta informed the court that he wanted Green to act in a standby capacity at trial. Ganta explained:

I got like attention disorder and I don’t know if I’m always being understood and I just feel that I know how I got to defend myself better than anybody else and that’s why I have him for standby because I’m not very academically wise and Karl really does a good job in explaining what the situation is and what happened and Karl I feel comfortable with. I’ve had other legal counsel, really sold me out

The circuit court told Ganta that it would not appoint either counsel or standby counsel for someone who it believed likely qualified for SPD representation.¹ The court then terminated Green's court appointment and directed Ganta to the SPD. The court further noted that, if it turned out that Ganta was not eligible for an SPD appointment after all, the court would be willing to reconsider and appoint an attorney to represent Ganta, but it would not in any case appoint standby counsel for trial at county expense. Ganta appeared for trial without counsel and without any further discussion on the record of whether he had reapplied or qualified for representation by the SPD or whether he wished to proceed on his own even if he could not have standby counsel.

¶5 After the jury convicted him, Ganta moved for a new trial on the basis that the record did not show an affirmative waiver of his right to counsel at trial. Ganta was the only witness at the evidentiary hearing. He testified that he had wanted Green to continue to represent him as standby counsel to help him with subpoenas and going over evidence to prepare for trial. He said he understood that the court would have been willing to appoint Green as full counsel, but that he wanted to run the trial himself and control his own fate and did not want to disclose his strategy to an attorney.

¶6 With regard to competence, Ganta testified he had graduated from high school with a low C average, but had no legal training. He acknowledged that he had previously represented himself at one trial where he was acquitted, and

¹ It is unclear from the record what had prompted the court's reassessment of Ganta's eligibility at that point. At an SPD eligibility hearing which was held after trial, it appeared that Ganta had previously been found ineligible for representation because he had equity in some property, but that the SPD had reconsidered after being provided with information about liens on the property.

had also appeared without representation to answer a number of traffic citations. He said most of the witnesses he wanted to have at the present trial—including the person who used the car before Ganta in which cocaine was found—did not appear because Ganta had not properly subpoenaed them. Ganta also noted that he had ADHD problems which led him to “jump around” in his thinking, and to end up “getting angry and yelling and acting out” before the jury.

¶7 The circuit court found that Ganta was competent to represent himself and had knowingly, voluntarily, and intelligently waived his right to counsel. It denied the motion for a new trial and Ganta appeals.

DISCUSSION

¶8 Once the right to counsel has attached, a defendant cannot proceed alone unless the record demonstrates a knowing, voluntary and intelligent waiver of the right to counsel, or the defendant forfeits the right by manipulative conduct which interferes with the orderly administration of justice. *State v. Klessig*, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997); *State v. Cummings*, 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996). When a defendant indicates a choice to proceed without counsel, courts have a responsibility to determine that the defendant has made a deliberate choice to proceed without counsel, with awareness of the difficulties and disadvantages of self-representation, the seriousness of the charges, and the general range of penalties, and also that the defendant is competent to represent himself. *Klessig*, 211 Wis. 2d at 206, 212. If the circuit court fails to conduct an adequate colloquy prior to trial, the defendant is entitled to a postconviction evidentiary hearing at which the state bears the burden of proving by clear and convincing evidence that a knowing, voluntary and intelligent waiver of counsel was made. *Id.* at 206-07. This court will

independently review the application of the relevant constitutional principles to the facts of record. *Id.* at 204.

¶9 Ganta argues that his repeated requests for standby counsel show that he never made a “deliberate choice” to proceed without any counsel at all. However, Ganta’s testimony established that he did understand that the court was not going to appoint standby counsel, but that it would appoint an attorney to fully represent him. Therefore, notwithstanding his expressed desire for standby counsel, Ganta was plainly aware prior to trial that he had to make a decision between representing himself without any assistance from counsel or relinquishing control of his defense to an attorney. His explanations as to why he did not want to relinquish control of his defense were sufficient to establish that he made a deliberate choice to represent himself.

¶10 Ganta does not dispute that he was aware of the difficulties of self-representation due to his prior pro se trial experience, but he maintains that the State failed to produce any evidence that he was aware of the seriousness of the charges, and the general range of penalties he faced. It is true that the State neglected to address the latter two points at the postconviction hearing. As the circuit court correctly noted, however, the court could look to the entire record as well as the testimony produced at the hearing to make its determination. *See generally State v. Van Camp*, 213 Wis. 2d 131, 145, 569 N.W.2d 577 (1997) (to meet its burden of showing a plea was knowingly and voluntarily made, the State “may rely on the entire record”). Since Ganta told the court at the preliminary hearing that he understood the charge and potential penalties he was facing, proceeded to present his case at trial, and never subsequently asserted any lack of understanding of the charge or penalties, we conclude based on the record as a whole that Ganta was in fact aware of the charge and penalties. In other words,

there was no need to address these points at the hearing because the record already established them.

¶11 Finally, Ganta claims that he was not competent to represent himself based on his attention deficit disorder and his actual performance at trial. However, the trial court, which was in the best position to observe that performance, stated that Ganta was intelligent and understood the proceedings, that his attention deficit disorder did “not affect his mental capacity,” and that he did a very good job representing himself. The record further shows that Ganta was literate and able to communicate his general defense that someone else had left the drugs in the car which he had been driving but did not own. We cannot say that the trial court’s competency determination was unsupported by the facts apparent in the entirety of the record. *See Van Camp*, 213 Wis.2d at 145. Therefore, we uphold it.

By the Court.—Judgment and order affirmed.

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

