COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2128-CR **Cir. Ct. No. 00-CM-2110**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAY M. TIMM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Jay M. Timm appeals from a judgment of conviction for the unlawful use of a telephone pursuant to WIS. STAT. § 947.012(1)(a). Timm also appeals from an order denying his postconviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

motion to withdraw his plea, or, in the alternative, to vacate a condition of probation requiring his probation agent or the trial court to give prior approval to any lawsuit that Timm desires to commence. We affirm the judgment and the postconviction order.

FACTS AND PROCEDURAL HISTORY

¶2 The criminal complaint charged Timm with two counts of unlawful use of a telephone pursuant to WIS. STAT. § 947.012(1)(a).[2] Because Timm pled no contest to one of the counts under a plea agreement, we take the facts from the criminal complaint.

¶3 The victim reported to the police that Timm, her ex-fiancée, had been harassing her with repeated telephone calls. As a result, she began keeping a log of the calls. During the calls Timm was profane, verbally abusive and he threatened to take the victim's children from her. On August 6, 2000, Timm called the victim twelve times between the hours of 7:42 p.m. and 9:15 p.m. In addition, Timm placed fifteen calls to the victim between the dates of August 7, 2000 and August 30, 2000. The victim reported that she was frightened and intimated by these calls.

¶4 Timm made his initial appearance with a public defender on December 12, 2000. At the next proceeding on December 26, 2000, Timm

[2] The criminal complaint alleged that on August 6 and 7, 2000, Timm, "with the intent to frighten, intimidate, threaten, abuse or harass, ma[de] a phone call and threaten[ed] to inflict injury or physical harm to [the victim]."

appeared without counsel and entered a not guilty plea to the charges.[3] When the trial court asked Timm about an attorney, Timm replied that he did not need one and that he wished a jury trial. The trial court set a jury trial date for March 12, 2001, but also scheduled the matter for further review on March 8, 2001. The court expressed the hope that Timm would appear with an attorney at that time. In response, Timm said, "No, I won't, Your Honor." At the conclusion of the proceeding, the court again urged Timm to consult an attorney. Timm responded, "Well, I didn't do anything wrong." The court then told Timm:

> Sometimes that's when it's even more important to see an attorney, if you don't think you did anything wrong, because I don't know how you're going to handle a Jury Trial on your own, and sometimes … innocent people get found guilty. That's why it's important, especially if you don't think you did anything wrong.

¶5 At the review proceeding on March 8, 2001, the trial court took up the matter of Timm's self-representation. The court informed Timm of his rights to representation or self-representation and that the public defender's office was available to assist him. Timm responded that the public defender's office had determined that he did not qualify for representation. The court then asked Timm whether he wanted the court to appoint an attorney. Timm equivocated on this offer, but ultimately decided to represent himself when he learned that the scheduled jury trial would have to be postponed if the court were to appoint an attorney.

[3] The record does not explain why the public defender did not continue its representation of Timm. We can only assume that Timm did not qualify for further public defender representation or that Timm advised the public defender that he did not wish counsel.

¶6 Timm appeared on the scheduled jury trial date of March 12, 2001. But, for reasons not evident in the record, the trial did not take place on that date. However, the trial court again took up the matter of Timm's self-representation. Timm again confirmed his wish to represent himself. Nonetheless, the trial court urged Timm to consult with a lawyer. The trial court scheduled the matter for further review on May 9, 2001.

¶7 Timm failed to appear at the May 9, 2001 review proceeding. However, he did appear the following day. At that time, the prosecutor advised the trial court that he and Timm had reached a plea agreement whereby Timm would plead no contest to one of the unlawful use a telephone charges and the State would dismiss the other charge and recommend probation. In addition, the State agreed to not charge Timm with violating a harassment injunction and bail jumping.

¶8 Timm confirmed that the State had accurately stated the plea agreement. The trial court then engaged Timm in the requisite plea colloquy. During the course of this colloquy, the court again confirmed that Timm wished to proceed without an attorney. Timm further stated that he could read and write, that he was a university student, and that he had the intelligence and the ability to understand the proceedings. The court then accepted Timm's plea of no contest and further determined that the affidavit in support of the criminal complaint stated a factual basis for the plea.

¶9 The trial court then turned to the sentencing phase of the proceedings. The State reported that in addition to the harassing telephone calls, Timm had filed a string of seven lawsuits against the victim, resulting in legal expenses to her. The State asked that the trial court place Timm on probation with

conditions that he not contact the victim and not file any further lawsuits against the victim unless he had prior approval of his probation agent. The court adopted this recommendation with the further proviso that if Timm felt aggrieved by the probation agent's veto of any proposed lawsuit, Timm could bring the matter to the trial court.

¶10 Postconviction and represented by present counsel, Timm sought to withdraw his no contest plea on a variety of grounds. Germane to this appeal, Timm argued that the trial court had not sufficiently established Timm's ability to understand the "potential benefits and pitfalls of self-representation." The trial court disagreed and denied the motion. Alternatively, Timm challenged the condition of probation relating to the future filing of lawsuits by him. The court also rejected this challenge. Timm appeals.

DISCUSSION

1. Plea Withdrawal

¶11 Timm focuses on his right to self-representation and contends "it is not at all clear that Timm understood the difficulties and disadvantages of self-representation." Timm relies on ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), where the supreme court mandated a colloquy designed to ensure that an unrepresented 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 or her, and (4) was aware of the general range of penalties that could have been imposed. ***Id***. at 206.

¶12 Timm does not argue under ***Klessig*** that he was unaware of the seriousness of the charges or of the range of penalties that he faced. Nor do we read Timm to argue that the trial court did not adequately establish his waiver of his right to counsel. But if that is part of Timm's argument, we summarily reject it. As our recital of the procedural history of this case demonstrates, the trial court repeatedly explained the advantages of counsel to Timm and exhorted him to obtain counsel. At the plea hearing the court confirmed that Timm could read and write and that he was a university student. The court then asked Timm if he was "waiving [his] right to counsel in a free and understanding manner." Timm answered, "Yes." This record reflects not only an intelligent, knowing and voluntary waiver of counsel at the plea hearing, but also a recurring waiver of counsel throughout all of the proceedings.

¶13 Rather, Timm focuses on the second ***Klessig*** factor, claiming that the trial court did not make him aware of the difficulties and disadvantages of self-representation. We begin by observing that although Timm originally intended to take this case to a jury trial, the case was ultimately concluded under a plea agreement negotiated between Timm and the prosecutor. If, in fact, the case had progressed to a jury trial, we might agree with Timm that the present record is insufficient to establish Timm's awareness of the difficulties and disadvantages of self-representation before a jury. We hasten to add, however, that we have no reason to believe that the trial court would not have conducted a more detailed ***Klessig*** colloquy focusing on Timm's ability to represent himself before a jury *had the case proceeded in such a fashion*. But this case was resolved in a far less complex and daunting method for a layperson—a plea bargain negotiated between Timm and the prosecutor. So the question, as we see it, is not whether the trial court sufficiently advised Timm of the perils of representing himself in a jury trial

setting, but rather whether the trial court sufficiently put Timm on notice of the perils of self-representation given the manner in which this case was processed and ultimately concluded.

¶14 Looking to the entire record in this case, we see the trial court repeatedly urging Timm to consult with a lawyer. Timm's uniform response was that he did not need a lawyer since he was innocent. Wisely, the trial court responded, "Sometimes that's when it's even more important to see an attorney …." And the court added, "[I]nnocent people get found guilty." While the trial court's comments in this case focused more on the benefits that an attorney could provide than on the disadvantages of self-representation, these two concepts are very much the same side of the same coin. When a trial court is advising a defendant of the benefits of counsel, the court is functionally advising the defendant about the perils of self-representation. The language of WIS JI—CRIMINAL SM-30 III.A., Understanding the Disadvantages of Self-Representation, echoes this thought: "The disadvantages of self-representation are to a significant degree the mirror image of the benefits of representation by counsel that are described in the waiver of counsel inquiry." Given the procedure of this case and the manner in which the case was concluded, we hold that the trial court properly established Timm's awareness of the difficulties and disadvantages of self-representation.

¶15 However, that does not conclude our discussion. Even in the face of the defendant's valid waiver of counsel and understanding of the disadvantages of self-representation, the trial court must also assure that the defendant is competent

to provide self-representation.[4] ***Klessig***, 211 Wis. 2d at 212. Factors bearing on this question include the defendant's education, literacy, fluency in English, and any physical or psychological disability that may significantly affect the defendant's ability to communicate a possible defense. ***Id***.

¶16 In this case, the trial court conducted a series of hearings in which it engaged Timm in dialogue about the case, particularly regarding the matter of self-representation. In all of these proceedings, Timm proved himself to be literate and fluent. He was a university student. And while we may question Timm's judgment about representing himself (a factor present in nearly every case involving a defendant who chooses self-representation), we see nothing in this record which suggests that Timm was operating under any disabilities that *significantly* impaired his ability to present or communicate a defense. In fact, the end result of this case reveals Timm to have been very competent in his self-representation. In the face of strong incriminating facts, Timm was able to negotiate a dismissal of one of the charges in exchange for probation under a withheld sentence with no jail time.

¶17 We conclude that the trial court properly denied Timm's motion to withdraw his no contest plea.

2. "No Lawsuit" Condition of Probation

¶18 Alternatively, Timm challenges the condition of probation that prohibits him from commencing any further lawsuits unless he has the prior

[4] Timm's postconviction motion did not raise the question of his competency for self-representation. Nor does Timm expressly raise this issue on appeal. We address the issue nonetheless.

approval of his probation agent or the trial court. In making this argument, Timm acknowledges that his constitutional right of access to the courts is not absolute or unconditional. ***Village of Tigerton v. Minniecheske***, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). However, Timm complains that the limitation of his right of access to the courts is not sufficiently tailored to achieve the desired result.

¶19 In ***Minniecheske***, a harassment injunction barred the petitioners from commencing any lawsuit against the Village of Tigerton and certain others without prior approval of the court. ***Id***. at 779. Although the injunction did not so state, the court of appeals construed it to apply to frivolous litigation. ***Id***. at 786. As so modified, the court of appeals upheld the injunction. ***Id***. The court said that conditions of probation may impose limitations upon a litigant "so long as they are, taken together, not so burdensome as to deny the litigant meaningful access to the courts." ***Id***. at 785 (citation omitted).

¶20 Here, the condition of probation stemmed directly from Timm's pattern of harassment against the victim both by use of the telephone as charged in the complaint and by use of repeated litigation as reported at the sentencing. WISCONSIN STAT. § 973.09(1) allows the court to impose any conditions of probation that appear reasonable and appropriate. This authority extends to limitations upon constitutional rights so long as they are not overly broad and are reasonably related to the defendant's rehabilitation. ***State v. Miller***, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). Construing the condition of probation as traveling to frivolous lawsuits against the victim, we see the condition of probation as eminently reasonable and necessary under these standards.

¶21 The obvious purpose of the condition of probation is to control Timm's penchant for harassing the victim by filing harassing litigation. The

condition does not bar outright Timm's access to the courts. Rather, it makes that right subject to reasonable control—the prior approval of Timm's probation officer. To further protect Timm's right of access to the courts, the trial court added a further layer of protection by providing for judicial review of the probation agent's rejection of any proposed lawsuit. This case is like ***State v. Oakley***, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200. There, the condition of probation barred the defendant from procreating any more children unless he first demonstrated that he had the ability to support such putative children and his existing children. ***Id***. at ¶6. The supreme court upheld the condition as not overly broad because it did not absolutely eliminate the defendant's ability to procreate. ***Id***. at ¶20. The court said, "[B]ecause Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by law, we find that the condition is narrowly tailored to serve the State's compelling interest of having parents support their children." ***Id***.

¶22 The same is true here. Timm can obtain access to the courts by filing only nonfrivolous actions against the victim. That requirement serves the State's interests in not having its scarce judicial resources diverted to frivolous litigation and in protecting the victim from further harassment.

CONCLUSION

¶23 We uphold the trial court's denial of Timm's motion to withdraw his no contest plea. We also uphold the disputed condition of probation.

By the Court.—Judgment and order affirmed.

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