

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2003

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. 02-0262-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-114

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN L. LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
PETER J. NAZE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bryan Lopez appeals a judgment of conviction for battery by a prisoner. Lopez contends the trial court erred by allowing him to represent himself. We disagree and affirm the judgment.

BACKGROUND

¶2 On January 28, 2000, Lopez was in his cell in the segregation unit at the Green Bay Correctional Institution when he began yelling and pounding his fists on a metal seat, cutting himself. According to testimony by unit manager Laura Hallet, Lopez was writing in blood, appeared to be out of control, and was rocking and chanting. After refusing to come out of his cell, correctional officers, including Matthew Ehlke, were ordered to remove Lopez from the cell. Lopez attempted to strike them several times. When Ehlke attempted to secure one of Lopez's arms, Lopez bit him on the left wrist, drawing blood and causing pain.

¶3 In a complaint filed on February 14, 2000, Lopez was charged with one count of battery by prisoner. After several adjourned hearings, Lopez appeared with a public defender on April 5. This hearing was then adjourned when the public defender raised the question of Lopez's competency.

¶4 Dr. James Armentrout evaluated Lopez and concluded he was not competent to stand trial due to his refusal to take necessary medications. At a June 27, 2000 hearing, however, Lopez told the court he was competent. A competency hearing was scheduled for July 17 but adjourned to August 9 because Lopez requested a new public defender.

¶5 At the August 9 hearing the new public defender stated he had not met with Lopez because Lopez was now at the Wisconsin Resource Center and could not be transferred for the hearing. The hearing was again adjourned to September 18.

¶6 Dr. Armentrout appeared by telephone at the September 18 hearing and testified that Lopez was not competent to proceed to trial. Based on this

testimony, the court found Lopez incompetent and ordered that medications could be administered to Lopez against his will.

¶7 A review hearing was held on November 30. Lopez was represented by a third new public defender, who requested a new competency hearing. Dr. David Mays evaluated Lopez and testified at a hearing on February 9, 2001, that Lopez was competent to proceed to trial. The court then found Lopez competent.

¶8 After several adjourned hearings, Lopez's initial appearance was on April 12, 2001. Lopez appeared with another new attorney. A preliminary hearing was held on April 25. Lopez appeared at this hearing pro se, and was bound over for trial.

¶9 At his arraignment on May 18, Lopez again appeared with a new attorney. This attorney, in a letter to the court, requested that new counsel be appointed. However, at a July 3 motion hearing, the attorney was ordered to remain on the case.

¶10 The case proceeded to a jury trial on July 30. After voir dire concluded, Lopez indicated to the court that he wished to represent himself. The court engaged in a colloquy with Lopez regarding whether Lopez understood the consequences of self-representation. Satisfied with Lopez's answers, the court allowed Lopez to represent himself with the aid of his current attorney as standby counsel.

¶11 The jury returned a guilty verdict. The court withheld sentence and placed Lopez on thirty months' probation, with one year in county jail.

¶12 On October 4, 2001, through his most recent attorney, Lopez filed a notice of intent to seek postconviction relief. An attorney from the office of the Wisconsin State Public Defender filed this appeal on Lopez’s behalf. Lopez is currently represented by an attorney privately retained by his family.

DISCUSSION

¶13 A criminal defendant in Wisconsin is guaranteed the fundamental right to the assistance of counsel for his or her defense by both article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *State v. Klessig*, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997). Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment also give a defendant the right to conduct his or her own defense. *Id.* at 203.

¶14 Our Wisconsin Supreme Court has recognized that the interaction of the right to counsel and the right of self-representation “create[s] somewhat of a dilemma for the trial judge who is confronted with the unusual defendant who desires to conduct his own defense.” *Pickens v. State*, 96 Wis. 2d 549, 556, 292 N.W.2d 601 (1980). “[T]he trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result.” *Id.* at 569.

¶15 When a defendant seeks to proceed without an attorney, the circuit court must determine whether he or she (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed without an attorney. If the defendant knowingly, intelligently and voluntarily waives the right to assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to do so. *Klessig*, 211 Wis. 2d at 203-04.

1. Waiver

¶16 Whether a defendant has knowingly, intelligently and voluntarily waived the right to counsel requires the application of constitutional principles to the facts of the case, which we review independently of the trial court. *Id.* at 204.

¶17 In *Pickens* the Wisconsin Supreme Court originally set forth the specific requirements for a valid waiver. *Klessig*, 211 Wis. 2d at 204. The *Pickens* court concluded that in order for an accused's waiver of counsel to be valid, the record must reflect not only the deliberate choice to proceed without counsel, but also an awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges the defendant is facing and the general range of possible penalties that may be imposed if the defendant is found guilty. *Klessig*, 211 Wis. 2d at 205 (citing *Pickens*, 96 Wis. 2d at 563-64). *Klessig* overruled *Pickens* to the extent that *Klessig* mandated a colloquy in every case to establish knowing and voluntary waiver of the right to counsel. *Id.* at 206. If the trial court fails to conduct such a colloquy, a reviewing court may not conclude, based on the record, that there was a valid waiver of counsel. *Id.* at 205.

¶18 *Klessig* mandates the court question Lopez at length about his desire to represent himself. The record demonstrates a very thorough colloquy. Lopez stated that he understood the role of an attorney and that he would be required to follow the same rules as an attorney. The court cautioned Lopez that it is generally foolish to represent oneself. However, Lopez stated he had done a lot of work on his case, was aware of the disadvantages of self-representation and wished to proceed without an attorney despite those difficulties. Further, Lopez stated that he understood the charges against him and the possible penalties. Based on this colloquy, the court accepted Lopez's waiver and also appointed

standby counsel. We are satisfied that the trial court conducted an adequate colloquy that demonstrates that Lopez's waiver of his right to counsel was knowing, intelligent and voluntary.

2. Competency

¶19 In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent himself or herself than for determining whether a defendant is competent to stand trial. *Klessig*, 211 Wis. 2d at 212. Factors to be considered when determining whether a defendant is competent to proceed without an attorney include the ability to read and write, education, informal study of the law, verbal skills and intellectual ability, and actual handling of the case. *Id.* at 213.

¶20 On review, the trial court's competency determination will be upheld "unless totally unsupported by the facts apparent in the record." *Pickens*, 96 Wis. 2d at 569-70. We give this deference because the trial judge is in the best position to observe the defendant's conduct and demeanor and to evaluate the defendant's ability to present a meaningful defense. *See id.* at 568.

¶21 The trial court determined that Lopez had a ninth-grade education, was literate, and had represented himself in prison disciplinary proceedings. The court concluded that with standby counsel, Lopez was competent to represent himself. Lopez does not dispute any of the findings regarding his education, literacy or preparation, but argues that the court's finding was erroneous because his mental and emotional problems affected his ability to communicate a meaningful defense to the jury.

¶22 The record does not support Lopez's argument. Lopez was able to present his theory of defense that there was no physical evidence proving he bit Ehlke, arguing there was a missing videotape of the officers' entry into his cell. Lopez also argued the officers beat him because he had been sexually involved with female officers during his incarceration. While we recognize that Lopez may not have conducted his defense in the most effective manner, it does not follow that he was incompetent. Additionally, Lopez had standby counsel available and did receive help and input during the trial.

¶23 We therefore conclude that Lopez's mental and emotional problems did not affect his ability to present a defense to the jury. Because Lopez made a knowing, intelligent and voluntary waiver of his right to counsel, and because the record demonstrates that Lopez was competent to represent himself, we affirm the judgment.

By the Court.—Judgment affirmed.

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

