COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0451-CR **Cir. Ct. No. 99-CF-0059**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES W. GOMEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment, an amended judgment and an order of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Judgment and order affirmed; amended judgment reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. James Gomez appeals a judgment following entry of his guilty plea to one count of reckless homicide, contrary to WIS. STAT. § 940.02(1). He also appeals an amended judgment containing a no contact

provision, and appeals an order denying postconviction relief.[1] Gomez raises the following claims of error: (1) The circuit court erroneously found him incompetent to represent himself at trial; (2) the continuation of proceedings following the declaration of a mistrial violated Gomez's right against double jeopardy; (3) the circuit court erroneously denied Gomez's right to withdraw his guilty plea; (4) the circuit court erroneously exercised its discretion when it sentenced Gomez to the maximum term of incarceration; and (5) the circuit court erroneously amended the judgment to include a no contact provision with the victim's family. We reject all but the final argument. Therefore, we affirm the judgment, amended judgment and order in all respects with the exception that the no contact provision is reversed. We remand with directions to the trial court to vacate the no contact provision.

Background

¶2 On February 4, 1999, Gomez arrived at the Wausau Hospital emergency department with his infant son who was pulseless and not breathing. Gomez had been watching the child while his girlfriend, the child's mother, was at work. Gomez explained to hospital personnel he had been watching television while the child slept on the couch. Gomez noticed the child looked "funny" and, when he picked the baby up, the baby was not breathing and was unresponsive.

[1] The notice of appeal denotes a judgment, an amended judgment and postconviction order. The document entitled amended judgment merely adds a no contact provision.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 Although resuscitation efforts restored a pulse, life support was discontinued on February 6 because the baby was declared brain dead. According to the coroner's report, the baby was a four-month-old healthy male who suffered brain injury as a result of occluded blood flow to the brain depriving him of oxygen. The report attached the preliminary autopsy report, which noted head bruises and a fractured right ulna, consistent with previous abuse. It stated:

> The exact mechanism of occluding blood flow to the brain is unknown. HOWEVER, the mother of baby Gomez has disclosed the fact that on multiple occasions the father would subdue the crying baby by means of a "sleeper hold". A "sleeper hold" is consistent with, and an effective mechanism to occlude the flow of blood to the baby's brain, thus causing anoxic/ischemic brain injury and ultimately death.

The coroner listed the cause of death as "[a]noxic encephalopathy as a result of homicidal assault."

¶4 The baby's mother told investigating officers that Gomez had admitted to her that at various times he used a "sleeper hold" to quiet the baby. This was a wrestling hold that would result in the baby becoming unconscious for a few minutes and, on awaking, to have a dazed appearance. The mother told officers she witnessed Gomez using this hold on two occasions. She stated that she was so frightened that this hold would kill the baby, she surreptitiously tape recorded a conversation in which Gomez admitted using these holds on the baby. She turned the tape over to officers.

¶5 After Gomez was charged with first-degree reckless homicide,[2] his attorney was allowed to withdraw from representation due to a conflict of interest. Later, Gomez discharged two other defense attorneys.

¶6 A competency evaluation determined that Gomez was competent to stand trial and assist in his own defense. The record shows that Gomez was twenty-five years old, graduated from high school, and had never been treated for any mental illness. He was able to understand criminal proceedings, understood legal terminology and trial procedures, was not delusional and was of normal intelligence. The circuit court appointed a third attorney, Gene Linehan, to represent Gomez at county expense. Gomez, however, sought to proceed pro se. Following motion hearings, the court permitted Gomez to represent himself, but required Linehan to act as standby counsel.

¶7 Gomez proceeded to trial with Linehan acting as standby counsel. On the first day of trial, at a lengthy conference regarding his witness list for purposes of voir dire, Gomez stated that one of the numerous witnesses he wanted to subpoena was Attorney General James Doyle because his name was on state crime lab documents. Gomez told the court, "I know there is a certain type of conspiracy involved. I know there is."

¶8 On the third day of trial, the circuit court held a conference outside the jury's presence to attempt to determine the number of witnesses that Gomez planned to call. This in-chambers conference resulted in the court finding that Gomez was not competent to represent himself and declaring a mistrial. The court

[2] Gomez was also charged with two counts of misdemeanor battery and one count of unlawful telephone use; these were later dismissed as part of plea negotiations.

expressed its concern that the witness list kept growing and pointed out that it was unnecessary, for example, to call six witnesses to testify that a broken bone was found, particularly where Gomez did not dispute that there was a broken bone. Gomez answered that he would like to have "somebody give input" who was not a State witness. The court indicated that it would not permit cumulative testimony.

¶9 Gomez replied that the State's witnesses had been coached and his past attorneys did not properly investigate. The court pointed out that Gomez had all the medical reports and that it was unlikely the doctors' testimony would vary from their reports. In response, Gomez accused one doctor of filing a false report regarding retinal hemorrhages. The court agreed that Gomez was entitled to challenge medical reports on cross-examination or by calling his own expert witnesses. However, the court concluded that Gomez's witness list of fifty-six names included cumulative testimony.

¶10 The court also pointed out that it had ordered payment of expert witness expenses "for Mr. Linehan to hire an expert for you to look at all these things that these doctors had done and to decide whether or not he would testify and how he would testify, but you wouldn't cooperate with Mr. Linehan. You wouldn't let him do it." The court indicated its concern that Gomez appeared to be exhibiting signs of paranoia because "you're cutting your own throat because you won't cooperate with anybody. Everyone's against you."

¶11 The court advised the prosecution that it would also be required to reduce its witness list, expressing concern that a sports director from a television station did not appear to be a necessary witness. The court stated it wanted to stay focused on the homicide and avoid peripheral issues. It expressed concern that Gomez was attempting to present repetitive testimony.

¶12 When the court asked Gomez to name a certain expert he wanted, Gomez replied that he was not positive of the expert's name. The court asked Gomez to name three experts whom he wanted to call. Gomez responded: "Well again, you know, I didn't know who you were going to grant and who you weren't going to grant, so I didn't really get that much established …." Gomez named one expert on sudden infant death syndrome from Minnesota, but advised: "I haven't talked to her directly yet. I wrote a letter way back when." He stated that he obtained her name from the Internet. He did not obtain a response directly from her, but thought it was from somebody else in her office. The letter did not say whether she would come to testify, because "I didn't know if I was going to be able to call her, so I didn't establish that." Gomez identified another witness from Indiana whose name he also obtained from the Internet. He had not spoken to this witness directly, but had written a letter.

¶13 The court stated that it would not permit an unlimited number of witnesses to provide general information about sudden infant death syndrome. At this point, the prosecutor questioned whether Gomez possessed the minimal competency to conduct his own defense because, after an hour of discussion, Gomez was still unable to name his witnesses and tell the court what they had to offer. Gomez replied that he knew who he wanted to call and generally what they would testify to and "I think if I have the opportunity to have them on the stand and question them, the other things will work themselves out."

¶14 After additional discussion, the court concluded that Gomez did not understand the advantages of being represented by counsel and the disadvantages of self-representation. The court found that Gomez did not understand trial preparation and, due to expert medical testimony, his was a "very complicated" case. Based on the way Gomez was conducting his defense, the court found that

Gomez had "no conception" of the difference between a fact and expert testimony. The court stated:

> You have no conception of what that is. I've tried to hammer that to you for an hour and a half this morning. I get nowhere. I get absolutely nowhere, because you just refuse to listen to me, and you've refused to accept what I'm telling you. That means you don't understand, that you have no idea what the hell is going on and how a system works.

¶15 The court determined that Gomez lacked minimal competence to conduct his own defense because he lacked a rudimentary understanding of how to secure expert testimony and what type of information to present. The court stated: "And I cannot in good conscience allow him to subpoena sixty witnesses that we have no idea what they're going to tell us or whether or not they're cumulative or whether or not they're in fact necessary to the case." The court found:

> [Y]ou are not capable of conducting your own defense because you are, in fact, incapable of understanding what a defense means, and how you are to conduct it, and how you are to handle witnesses, and how you are to subpoena witnesses, and how you are to handle experts, and what experts do. You don't understand opening statements.

Gomez objected to the court's findings. The court ruled that it would continue the trial with Linehan stepping in to represent Gomez.

¶16 Linehan responded that there were "lots of problems with that." Linehan observed that Gomez gave a two and one-half hour opening statement that "opened the door for tapes that were suppressed by the court. … There's been a suppression order for evidence that is now admissible because of his actions." Linehan pointed out the quandary posed by an "incompetent opening statement that I can't go back and correct, nor can I cleanse the mind of the jury." Linehan stated, "He torpedoed himself," and explained further: "In my opinion, Judge,--

I've handled fifty to sixty homicide cases. I've been trying cases of magnitude for 26 years. With the cross-examination that Mr. Gomez performed, I think he probably has already committed legal suicide." Gomez stated that he was ready, willing and able to proceed. The court on its own motion declared a mistrial.

¶17 On April 4, 2001, Gomez entered a no contest plea to one count of first-degree reckless homicide.[3] He later sought to withdraw his plea based upon the violation of his right to represent himself and the lack of manifest necessity for the mistrial. The motion was denied. The court sentenced Gomez to the maximum prison sentence of forty years, with credit for time served. Later, the court denied Gomez's postconviction motion to set aside his conviction and sentence. It granted the State's motion to amend the judgment of conviction to include a no contact order with the victim's mother and family.

Discussion

I. Competence to represent oneself

¶18 Gomez argues that the trial court erroneously found him incompetent to represent himself. We disagree. 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.

[3] There is no dispute regarding the adequacy of the plea colloquy.

¶19 When a defendant seeks to proceed pro se, 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 pro se. 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. ***State v. Klessig***, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997).

¶20 Here, there is no dispute that Gomez validly waived his right to counsel. The only issue is whether he was competent to conduct his own defense. "[C]ompetency to stand trial is not the same as competency to proceed pro se and … even though he has knowingly waived counsel and elected to do so, a defendant may be prevented from representing himself." ***Pickens***, 96 Wis. 2d at 567, *rev'd on other grounds*, ***Klessig***, 211 Wis. 2d at 210 (citations omitted). The ***Pickens*** court reasoned that "[c]ertainly more is required where the defendant is to actually conduct his own defense and not merely assist in it." ***Pickens***, 96 Wis. 2d at 567. "[A] defendant who, while mentally competent to be tried, is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimum understanding necessary to present a defense, is not to be allowed 'to go to jail under his own banner.'" ***Id.*** at 568 (citation omitted).

¶21 Therefore, in Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself 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 pro se include the defendant's ability to read and write, his education, his informal study of the law, his verbal skills and intellectual ability, and his actual

handling of the case. ***Id.*** at 213. This determination must rest to a large extent upon the judgment and experience of the trial judge. ***Id.*** at 212.

¶22 ***Klessig*** refers to WIS JI—CRIMINAL SM-30A for a discussion of how a circuit court should determine whether a defendant is competent to represent himself. *See* ***id.*** at 212, n.8. This section cautions that a competency determination should not prevent persons of average ability and intelligence from representing themselves unless a "specific problem [or] disability can be identified which may prevent a meaningful defense from being offered, should one exist." WIS JI—CRIMINAL SM-30A.[4] "Also, technical legal knowledge, as such, is not relevant to an assessment of a knowing exercise of the right to defend oneself." ***Id.*** WISCONSIN JI—CRIMINAL SM-30A provides that denial of a request for self-representation must be supported by one of the following findings:

> 1. that the defendant does not understandingly and voluntarily waive his right to counsel; or
>
> 2. that the defendant does not understand the disadvantages of self-representation; or
>
> 3. that the defendant suffers from a specific disability that would prevent him from presenting a valid defense.

¶23 Gomez argues that he has sufficient intelligence, education and literacy skills to function in the courtroom. He complains that the circuit court failed to identify any specific problem or disability that would prevent him from presenting a defense, other than paranoia, stubbornness and an unwillingness to

[4] Although WIS JI—CRIMINAL SM-30A says "problem *of* disability," it quotes ***Pickens v. State***, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980), which states "problem *or* disability." Therefore we conclude "or" is the correct term.

listen. He complains that the court merely engaged in paternalism resulting from its disagreement with his trial strategy. We disagree.

¶24 Here, the circuit court supported its decision with appropriate findings and the record supports those findings. The court found that Gomez did not understand the disadvantages of self-representation. *See* WIS JI—CRIMINAL SM 30A. In making this determination, the court considered his "actual handling of the case," a legitimate factor under ***Klessig***, 211 Wis. 2d at 213.

¶25 From the record before us, it is apparent that Gomez did not simply lack technical legal knowledge or that the court merely disagreed with Gomez's trial strategy. Rather, Gomez's attempts at conducting his own defense demonstrated that his pervasive suspicion of everyone involved prevented him from making rational choices regarding the presentation of witnesses. For example, Gomez wanted to subpoena Attorney General James Doyle and medical experts whose names he obtained from the Internet but whom he had not contacted. Gomez did not have a witness list prepared and over the course of two days continued to add lay and expert witnesses despite having no knowledge of their testimony. At a later competency hearing, Gomez admitted that none of the experts he wanted as witnesses had seen the medical files in this case and would not give an opinion without having seen the records. The circuit court reasonably concluded that Gomez was unable to properly locate, secure, prepare and call medical experts or other witnesses, which was basic to presenting a defense.

¶26 "One might not be insane in the sense of being incapable to stand trial and yet lack the capacity to stand trial without benefit of counsel." ***Klessig***, 211 Wis. 2d at 210-11 (citation omitted). Here, the court reasonably concluded that while Gomez possessed competence to assist in his own defense, his actual

handling of the case demonstrated that he did not understand the disadvantages of self-representation and lacked the minimal competence to proceed pro se. *See* ***id.*** at 194.

¶27 As the trial court pointed out, "once the trial got started, things got out of hand real fast." "[N]either the State nor the defendant is served when a conviction is 'obtained as a result of an incompetent defendant's attempt to defend himself.'" ***Id.*** at 211 (citation omitted). Because the record discloses a rational basis for the court's determination, we do not overturn it on appeal.

II. Double jeopardy

¶28 Next, Gomez argues that the case should have been dismissed on double jeopardy grounds because there was no manifest necessity for a mistrial. We disagree. "If the trial is terminated over the defendant's objection and without his or her consent, such as upon … the court's sua sponte decision, then retrial is barred unless the proceedings were terminated because of manifest necessity." ***State v. Lettice***, 221 Wis. 2d 69, 80, 585 N.W.2d 171 (Ct. App. 1998). The manifest necessity standard protects a defendant's important right to have his or her case finally decided by the tribunal first impaneled to hear it while at the same time maintaining "the public's interest in fair trials designed to end in just judgments." ***Id.*** (citation omitted).[5]

[5] We recognize the trial court is not required to utter the words "manifest necessity" when declaring a mistrial. ***State v. Copening***, 100 Wis. 2d 700, 709-10, 303 N.W.2d 821 (1981).

¶29 The trial court's exercise of discretion in declaring a mistrial must be scrupulous. ***State v. Copening***, 100 Wis. 2d 700, 709-10, 303 N.W.2d 821 (1981). Our review is nonetheless deferential:

> The trial court's exercise of discretion in making this sua sponte determination is ordinarily entitled to considerable deference on review by an appellate court. This is because the usual prejudicial development resulting in mistrial is of a type whose effect is best assessed by the trial court's first-hand observation. It is appropriately left to the exercise of trial court discretion; and on review the test is whether, under all the facts and circumstances, giving deference to the trial court's first-hand knowledge, it was reasonable to grant a mistrial under the "manifest necessity" rule. It has been pointed out that a stricter standard might deter trial courts from granting mistrials, even when under the circumstance it appears appropriate, because of the fear that an appellate court might too readily disagree and reverse, which result would bar retrial.

Id. (citations omitted).

¶30 The question is whether, under all the facts and circumstances, giving deference to the trial court's first-hand observation, it was reasonable to grant a mistrial under the "manifest necessity" rule. ***Id.*** at 710. The record supports the circuit court's decision. Although the court initially considered ordering stand-by counsel to continue with the trial before the same jury, the court appropriately determined that under the circumstances, the ends of justice would be defeated. For example, it would not have been possible to eliminate from the jury's consideration the inadmissible tapes of Gomez's incriminating statements to which Gomez referred during opening statements. Also, the court reasonably concluded that Gomez's lack of preparedness and pervasive distrust had irretrievably compromised his ability to present witnesses and conduct a defense. Because the record supports the court's determination of manifest necessity, Gomez was not subjected to double jeopardy.

III. Denial of motion to withdraw plea

¶31 Gomez argues that the trial court erroneously exercised its discretion when it denied his motion to withdraw his no contest plea before sentencing. He argues that his decision to enter a no contest plea was tainted by counsel being forced upon him against his will. At the hearing on his motion, he maintained his innocence and indicated that his acceptance of the plea bargain was a mistake caused in part by the earlier ruling to deprive him of his right to self-representation. We reject his argument.

¶32 Whether to permit the withdrawal of a guilty or no contest plea before sentencing is a determination committed to trial court discretion. ***State v. Kivioja***, 225 Wis. 2d 271, 283-84, 592 N.W.2d 220 (1999). We sustain the trial court's discretionary determination if it reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. ***Id.*** at 284.

> A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show a fair and just reason for allowing him or her to withdraw the plea. If the trial court finds the defendant's evidence credible and determines that it constitutes a fair and just reason, the court should permit withdrawal, unless the prosecution would be substantially prejudiced. The showing of a fair and just reason contemplates the "'mere showing of some adequate reason for the defendant's change of heart.'" A circuit court is to apply this test liberally, although a defendant is not automatically entitled to withdrawal.

State v. Shimek, 230 Wis. 2d 730, 738-39, 601 N.W.2d 865 (Ct. App. 1999) (citations omitted).

¶33 Although "fair and just reason" has not been precisely defined, reasons that have been considered fair and just in prior cases include: genuine misunderstanding of the plea's consequences; haste and confusion in entering the

plea; and coercion or misleading advice on the part of defense counsel. ***Id.*** at 739-40. An assertion of innocence and a prompt motion to withdraw are not in themselves fair and just reasons for a plea withdrawal, but are factors that bear on whether the defendant's professed misunderstanding, confusion or coercion is credible. ***Id.***

¶34 Gomez argues that his decision to enter his no contest plea was tainted by counsel being forced upon him against his will. We reject this "tainted plea" theory. Gomez does not assert that his attorney erroneously advised him or was constitutionally ineffective. The mere fact that he entered a plea following consultation with an attorney does not provide a fair and just reason for plea withdrawal.

¶35 Although Gomez suggested coercion and confusion as reasons for his plea withdrawal, the court rejected these reasons on credibility grounds. We defer to the trial court's assessment of weight and credibility. WIS. STAT. § 805.17(2). Although he asserted his innocence, this assertion is not dispositive of his motion. Gomez's argument essentially recasts his claim that the trial court erroneously ruled that he was incompetent to represent himself and ordered counsel to represent him. Because the trial court did not err in so ruling, his argument fails.

IV. Sentencing

¶36 Gomez argues that the trial court erroneously exercised its discretion in sentencing him to the maximum permissible sentence. He contends that because the trial court imposed the maximum sentence, it disregarded mitigating factors such as his minimal prior record. He further claims that the sentence demonstrates disparity with similar cases. We reject this argument.

¶37 The primary factors to be considered are the gravity of the offense, the character of the offender and the need for public protection. ***State v. Larsen,*** 141 Wis. 2d 412, 426-27, 415 N.W.2d 535 (Ct. App. 1987). The weight to be given each factor is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶38 Here, Gomez pled no contest to first-degree reckless homicide, recklessly causing the death of an infant under circumstances showing utter disregard for human life. The criminal complaint that formed a factual basis for the plea contained Gomez's admission prior to the infant's death that he used sleeper holds on the baby.

¶39 The court considered the gravity of the offense, Gomez's character, his lack of remorse, his low rehabilitative potential and his attempts at manipulation of others, including the court. The court determined that a lengthy incarceration was necessary for the public's protection. The trial court considered the appropriate factors and explained its reasons for imposing the maximum sentence.

¶40 It was within the court's discretion to give greater weight to these factors than to the lack of a lengthy criminal record. Gomez's argument that he lacks a prior record neglects mention of the dismissed and uncharged offenses read in at sentencing. Also, nothing in the record supports Gomez's claim of sentencing disparity.[6] Under our deferential standard of review, we conclude the record supports the court's sentencing discretion.

[6] Although at sentencing, defense counsel mentioned a Florida case where an unrestrained child suffocated due to a vehicle's air bags, no citation was provided.

V. No contact order

¶41 Gomez contends that the trial court erroneously amended the judgment of conviction to include a no contact order with the victim's mother and family. Citing ***State v. Gibbons***, 71 Wis. 2d 94, 99, 237 N.W.2d 33 (1976), he maintains that a trial court may place conditions only on probation but not on a prison sentence. He argues if there is no statutory authority for the court to impose a particular provision as part of a sentence, it acts without authority and its actions are void. *See* ***State v. Sepulveda***, 119 Wis. 2d 546, 553, 350 N.W.2d 96 (1984).

¶42 Also citing ***Gibbons***, the State agrees that a circuit court has no authority to specify conditions of a prisoner's confinement in state prison. In ***Gibbons***, the sentencing court conditioned the defendant's sentence on his opportunity to receive education and drug treatment. ***Gibbons***, 237 Wis. 2d at 34. The State contends that the no contact provision imposed here differs from conditions disallowed in ***Gibbons*** and that it should be upheld to prevent unwanted correspondence and telephone calls.

¶43 ***Gibbons*** holds "the court not permitted to place conditions on a sentence." ***Id.*** at 35. Because the State does not dispute Gomez's assertion that no legal authority supports the no contact provision, we summarily reverse the no contact order contained in the amended judgment. Our ruling does not affect any other portion of the judgment of conviction or order denying postconviction relief. Nor does it affect any other legal remedies the family may have. Therefore, the amended judgment is affirmed in part, reversed in part and remanded to the circuit court to vacate the no contact provision contained in the amended judgment.

By the Court.—Judgment and order affirmed; amended judgment reversed in part and cause remanded with directions.

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