

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 27, 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. 02-2631-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 00-CM-3297

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DUKE M. JAWARA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ and PATRICK J. TAGGART, Judges.<sup>1</sup>  
*Affirmed.*

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<sup>1</sup> Judge Stuart A. Schwartz conducted the trial proceedings in this action and pronounced sentence. Judge Patrick J. Taggart conducted the postconviction motion hearing and signed the order denying Jawara's motion for a new trial.

¶1 LUNDSTEN, J.<sup>2</sup> Duke M. Jawara appeals a judgment of the circuit court convicting him of possession of THC and of resisting an officer. He also appeals an order denying his motion for a new trial. The issues raised on appeal are the same issues raised in Jawara’s postconviction motion. Jawara contends that his Sixth Amendment right to counsel was violated because (1) the trial court allowed Jawara to represent himself without sufficient evidence that Jawara intended to forfeit his right to counsel; and (2) the trial court failed to re-determine whether Jawara was eligible for public representation when Jawara informed the court two days before trial that he was “not working.” We disagree with both arguments and affirm.

### ***Background***

¶2 On August 24, 2000, Jawara was charged with possession of THC and with resisting arrest. Jawara claimed he was indigent and requested a court-appointed attorney. On September 13, 2000, the circuit court, Judge Schwartz presiding, held an indigency hearing and determined that Jawara did not qualify for representation by a state public defender or for a court-appointed attorney. For unknown reasons, no transcript of either the indigency hearing or any of Jawara’s other pretrial hearings before Judge Schwartz exists. In a separate case, case number 01-CM-408, which was also before Judge Schwartz, Jawara was charged with misdemeanor bail jumping and with resisting an officer.<sup>3</sup> In a motion filed on April 16, 2001, the prosecutor requested a set over in order to allow more time

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<sup>2</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

<sup>3</sup> Jawara was acquitted in case number 01-CM-408, and obviously does not appeal from that verdict.

for the crime lab to conduct tests, which the trial court granted. There is no evidence that Jawara requested a set over in this case.

¶3 Jawara was unrepresented throughout the pretrial proceedings and during his trial. Jawara was convicted of possession of THC and resisting an officer after a jury trial held on June 20, 2001. At some time after the trial, Jawara obtained representation from the state public defender's office, and was represented at his sentencing hearing on August 20, 2001.

¶4 On May 7, 2002, Jawara moved for a new trial, alleging that he had been denied his Sixth Amendment right to counsel. As no transcript existed of the indigency hearing and other pretrial appearances, the case was transferred to Judge Taggart, in order to allow Judge Schwartz to testify at an evidentiary hearing on the motion. At the hearing, Judge Schwartz testified that he presided over Jawara's two criminal cases, which were tried back-to-back. Judge Schwartz testified that the cases were set over numerous times because Jawara did not have counsel and wanted to obtain counsel. Judge Schwartz testified that although he did not recall giving Jawara specific warnings about proceeding pro se, it was his standard practice to do so. Judge Schwartz explained:

My standard practice is to explain the advantages of having legal counsel, admonish them to go to the public defender, advise them of their right to an indigency review, explain to them that in some instances I can overrule the State Public Defender. In other instances I can appoint an attorney at county expense or with the individual reimbursing the county over time for any legal fees.

I will advise them that there's also the distinct possibility they could be found not to be indigent, at which point they are responsible for hiring their own legal counsel.

I will then advise them that if they appear in court the next time and they do not have an attorney, I would

consider that to be a waiver of their right for legal counsel, and that if they are otherwise competent they would be required to go ahead on their own.

¶5 Jawara introduced into evidence an excerpt from the jury selection hearing in case number 01-CM-408 dated June 18, 2001. The transcript includes an admonishment from Judge Schwartz to Jawara that Jawara had ample opportunity to obtain private counsel and had been warned of the disadvantages of proceeding without counsel. Judge Schwartz emphasized the seriousness of the four pending charges in both of Jawara's criminal cases, and Jawara responded, "[y]eah, I hear you. I hear you." The following exchange ensued:

[Jawara]: Yeah, but right now the place I work, I'm not working so --

[Judge Schwartz]: Well, you've had, Mr. Jawara, almost nine months to get legal counsel. I'm not going to set these matters over again.

[Jawara]: I did talk to lawyers. You sent me to the lawyers that the Judge sent me to. I went to the lawyers and talked to them. They read the police reports, said I don't need lawyer for this, go talk to the other guys. I went to them, kept sending me back and forth to each other, so that's what happened. I didn't get none of them because of that.

[Judge Schwartz]: Well, that was your choice to make, Mr. Jawara. I'm prepared to go ahead today, and I'm going to make a finding at this point that through your own actions you have waived your right to counsel and you can proceed on these cases on your own without an attorney.

Following the evidentiary hearing, Judge Taggart denied Jawara's motion for a new trial.

### *Discussion*

¶6 Jawara argues that he is entitled to a new trial because he was denied his right to counsel.

A defendant's right to assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article 1, sec. 7 of the Wisconsin Constitution. Whether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law.

*State v. Cummings*, 199 Wis. 2d 721, 747-48, 546 N.W.2d 406 (1996) (footnote and citations omitted). “Questions of ‘constitutional fact’ are not actually ‘facts’ in themselves, but are questions which require the ‘application of constitutional principles to the facts ....” *State v. Coleman*, 2002 WI App 100, ¶10, 253 Wis. 2d 693, 644 N.W.2d 283 (quoting *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984)).

¶7 Jawara contends that he did not voluntarily waive his right to counsel. “[A] defendant can generally only proceed pro se if the circuit court first determines that the defendant voluntarily and knowingly waived his or her right to counsel.” *Cummings*, 199 Wis. 2d at 752. This prerequisite extends to both indigent and non-indigent defendants. See *Keller v. State*, 75 Wis. 2d 502, 508, 249 N.W.2d 773 (1977). Furthermore, a trial court must conduct “a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel.” *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Jawara correctly notes, and the State does not dispute, that the record contains no evidence that Jawara intentionally waived his right to counsel, or that the trial court conducted a colloquy to determine whether Jawara

knowingly and voluntarily waived his right to counsel. Therefore, we are asked to decide whether Jawara, by his actions, forfeited his right to counsel.

¶8 The “right to counsel cannot be manipulated so as to obstruct the orderly procedure of the courts or to interfere with the administration of justice.” *State v. Woods*, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). Thus, “[a] defendant may, by his or her conduct, forfeit the right to counsel.” *Coleman*, 253 Wis. 2d 693 at ¶16. “However, forfeiture cannot occur simply because the effect of the defendant’s conduct is to frustrate the orderly and efficient progression of the case. The defendant must also have the purpose of causing that effect.” *Id.* at ¶18.

¶9 In *Cummings*, 199 Wis. 2d 721, the dissent laid out several steps that a circuit court should take before determining that a defendant has forfeited the right to counsel. *Id.* at 764 (Geske, J., dissenting). In a footnote, the majority recommended that circuit courts follow four steps suggested by the dissent, but did not adopt them. *Id.* at 756 n.18. These four steps suggest that a circuit court provide:

- (1) “explicit warnings that, if the defendant persists in ‘X’ [specific conduct], the court will find that the right to counsel has been forfeited and will require the defendant to proceed to trial pro se”;
- (2) “a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation”;
- (3) “a clear ruling when the court deems the right to counsel to have been forfeited”; and
- (4) “factual findings to support the court’s ruling.”

*Id.* at 764 (Geske, J., dissenting).

¶10 Jawara contends that the trial court did not follow any of the *Cummings* court’s recommendations in his case. Specifically, Jawara complains that the trial court “did not specifically warn [Jawara] that if he continued to appear without an attorney, the court would find that his right to counsel was forfeited.” Moreover, Jawara contends that whether he requested adjournment in case number 01-CM-408 is not relevant to these proceedings because it was the State who requested adjournment in this case.<sup>4</sup>

¶11 However, the record in this case contradicts Jawara’s claims. Although we do not have the benefit of a transcript of the indigency hearing, Judge Schwartz testified that his standard practice is to inform unrepresented defendants of the dangers inherent in self-representation, and to warn them that appearing without an attorney in subsequent hearings will constitute a waiver of their right to counsel. In fact, Judge Schwartz followed this exact procedure in case number 01-CM-408. Judge Schwartz warned Jawara of the maximum penalties Jawara faced from his four pending charges in the two criminal cases. Judge Schwartz made a specific finding that Jawara had waived his right to counsel and that he could “proceed on *these cases* on your own without an attorney” (emphasis added). It is evident from the record that Judge Schwartz found a waiver of Jawara’s right to counsel in both of Jawara’s pending criminal

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<sup>4</sup> Jawara also contends that it was improper for the State to call Judge Schwartz as a witness in this case. This argument is waived for two reasons: Jawara did not object to Judge Schwartz’s testimony at the postconviction hearing, and this argument is raised for the first time in Jawara’s reply brief. See *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (“Contemporaneous objection gives the trial court an opportunity to correct its own errors, and thereby works to avoid the delay and expense incident to appeals, reversals and new trials which might have been unnecessary had the objections been properly raised in the lower court.” (citations omitted)); *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) (“We will not, as a general rule, consider issues raised by appellants for the first time in a reply brief.”).

trials. Moreover, Judge Schwartz testified that on numerous occasions Jawara appeared before him and requested more time in which to obtain an attorney in case number 01-CM-408. Although Jawara did not request a set over in this case, it was reasonable for Judge Schwartz to infer from Jawara's requests in case number 01-CM-408 that Jawara also needed time to obtain an attorney in this case because the cases were being tried back-to-back. The opposite is also true. It would have been unreasonable for Judge Schwartz to believe that, although Jawara required more time to obtain an attorney to contest charges of bail jumping and resisting arrest in case number 01-CM-408, Jawara did not require more time to contest charges of marijuana possession and resisting arrest in this case. Therefore, Jawara's requests to push back the trial date in case number 01-CM-408 effectively pushed back his trial date in this case, and thus evidence obtained from case number 01-CM-408 is certainly relevant to determine whether Jawara forfeited his right to counsel.

¶12 Jawara next argues that his actions could not have forfeited his right to counsel because he did not intend to frustrate the orderly processing of his case. However, it has been established that Jawara requested additional time to obtain an attorney on numerous occasions. Jawara was warned of the consequences of his failure to obtain counsel. Jawara had nine months in which to obtain an attorney. Jawara did not present the circuit court with any evidence that giving him more time would enable him to procure representation. No identifiable purpose would be served by providing Jawara with more time, other than to delay and frustrate the court proceedings.

¶13 Alternatively, Jawara argues that Judge Schwartz misused his discretion in not granting Jawara court-appointed counsel. "Whether the facts require the appointment of counsel is left to the sound discretion of the trial court."



*State v. Dean*, 163 Wis. 2d 503, 514, 471 N.W.2d 310 (Ct. App. 1991). A trial court has the inherent power to appoint counsel. *See id.* at 513. “A defendant who seeks appointed counsel must present evidence to the trial court of his or her assets, income, liabilities and attempts to retain counsel.” *Id.* at 514. It is the defendant’s burden to prove indigency by a preponderance of the evidence. *Id.* at 513. “The court should consider all relevant evidence presented by the defendant that is material to the defendant’s present ability to retain counsel.” *Id.* at 514. “The trial court is not required to conduct an independent inquiry but must ask enough questions of the defendant so that the trial court can decide the question of indigency or order the defendant to report further to the trial court on the issue of indigency.” *Id.*

¶14 Jawara does not contest the trial court’s determination that Jawara was not eligible for court-appointed counsel at the September 13, 2000, indigency hearing. Rather, Jawara argues that a statement he made two days before trial obligated the trial court to *sua sponte* make a new indigency inquiry. During a proceeding before the court Jawara said: “right now the place I work, I’m not working so ....”

¶15 Jawara does not cite to any authority for the proposition that a trial court, after previously determining that a defendant is not eligible for court-appointed counsel, is obligated to revisit the issue. But we will assume, without deciding, that a judge has an obligation to revisit the topic of indigency if he or she is apprised of facts that would alert a reasonable judge that the topic should be revisited. However, even under such an assumption, Jawara’s statement two days before trial that he was “not working” told the trial court nothing about how long Jawara had not been working, how many assets he had, or even if he had actually lost his job. Jawara made no other statement suggesting his financial

circumstances had changed. We conclude that Jawara’s brief mention of “not working” was insufficient to trigger an obligation on the part of the trial court to make a new indigency determination.

¶16 Accordingly, the trial court did not misuse its discretion by failing to conduct a second indigency hearing to determine whether Jawara was eligible for court-appointed counsel.

*By the Court.*—Judgment and order affirmed.

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

