COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP970 **Cir. Ct. No. 2007CI6**

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

IN RE THE COMMITMENT OF LEE ALEXANDER BROWN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LEE ALEXANDER BROWN,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN FRANKE, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Lee Alexander Brown appeals from a judgment and order committing Brown to the custody of the Department of Health Services,

pursuant to WIS. STAT. § 980.06 (2007-08),[1] until such time as he is no longer a sexually violent person. Brown claims that the trial court erred when it permitted him to represent himself, and he asks us to remand this case back to the trial court for retrial. Because the trial court properly determined that Brown knowingly, intelligently, and voluntarily waived his right to counsel and that Brown was competent to represent himself, we affirm.

BACKGROUND

¶2 On June 18, 2007, the State filed a petition alleging that Brown was a sexually violent person as defined by WIS. STAT. § 980.01(7). Over the course of the next twelve months, Brown was represented by four different attorneys. Attorney Robert S. Prifogle represented Brown from June 2007 until September 2007 when he withdrew as counsel due to a conflict with Brown. Attorney Richard H. Hart then represented Brown beginning in November 2007 until April 2008 when he withdrew as counsel citing a breakdown in communication with Brown. Attorney Theodore R. Nanz began representing Brown in May 2008 but in June 2008 he withdrew as counsel at Brown's request. Thereafter, in June 2008, Attorney Thomas E. Harris was appointed to represent Brown. All the while, despite being represented by counsel, Brown filed numerous motions, petitions, and other correspondence with the court on his own behalf.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 On September 18, 2008, during a motion hearing, Brown requested that Attorney Harris withdraw as counsel.[2] Brown told the court that he wished to proceed *pro se*, prompting the following exchange:

> THE COURT: ….
>
> I'm also very reluctant to let you represent yourself unless that's what you want to do and you're sure that's what you want to do.
>
> [BROWN]: That's what I'm sure I want to do.
>
> THE COURT: So you're not asking that – that I refer this to the Public Defender's Office. You're not asking that I appoint another lawyer directly?
>
> [BROWN]: No. No, sir.
>
> THE COURT: You wish to represent yourself?
>
> [BROWN]: Yes, sir.

¶4 The State objected on the grounds that Brown was not competent to represent himself. After carefully considering its options, the trial court granted Attorney Harris's motion to withdraw as counsel and then set the matter over until the next day to determine whether Brown could represent himself. Before adjourning until the next day, the court warned Brown that WIS. STAT. ch. 980 petitions were "a complicated area of law and even someone who represents themselves in a fairly simple area can run into all sorts of trouble."

¶5 The following day, the trial court began by stating that it had reviewed the record and took note of the number of attorneys who had withdrawn

[2] The Honorable Jeffrey A. Wagner granted Attorneys Prifogle's, Hart's, and Nanz's motions to withdraw as counsel. Thereafter, due to judicial rotation, the Honorable John Franke presided over the case and entered all subsequent orders, including final judgment.

from the case. The trial court addressed some of Brown's concerns regarding his previous attorneys and explained that perhaps Brown's expectations were unreasonable. For instance, the court explained to Brown that due to limited judicial resources Brown could not attend all court hearings, that any attorney who represented him would have other matters to attend to and could not spend unlimited time with Brown, that an attorney representing Brown could not file motions that he or she deemed frivolous, and that an attorney cannot change the law short of challenging its constitutionality.

¶6 Brown reiterated that he wanted to represent himself and began to explain his difficulties with his previous attorneys as well as his legal arguments regarding the underlying petition. When the State attempted to interrupt, the trial court denied the request, explaining: "One of the things I've got to decide is whether Mr. Brown is competent to represent himself or at least I may have to decide that if this is viewed similar to a criminal case, and I've looked at the file. But listening to [Brown] talk may help me decide this."

¶7 The trial court then explained to Brown why an attorney could assist him with his case, even if Brown did not always agree with the attorney or like the attorney. And while Brown expressed frustration with the attorneys who had already represented him, he stated that he understood. The trial court also sought to ensure that Brown understood that the institutional commitment he was facing could be for the entirety of his life, and again Brown stated that he understood.

¶8 The trial court then asked Brown: "If I decide that you are not able to represent yourself under these circumstances and appoint yet another lawyer, will you work with that lawyer?" To which Brown responded: "No. I have to be honest, sir. I just do not trust the Public Defender's Office anymore. I mean it

appears to me that the Public Defender's Office is working for the [S]tate actually, petitioners to be more exact."

¶9 Based upon his back and forth with Brown, the trial court concluded that Brown was knowingly, intelligently, and voluntarily waiving his right to counsel, and that he was competent to represent himself. The trial court then asked Attorney Harris to act as standby counsel should Brown change his mind or request assistance.

¶10 Brown represented himself during a trial to the court in December 2008. At the conclusion of the trial, the court found Brown to be a sexually violent person as defined in WIS. STAT. ch. 980. Brown appeals.

¶11 More details from the court's two-day hearing on Brown's ability to represent himself are included below.

DISCUSSION

¶12 Brown's sole claim on appeal is that the trial court erred when it permitted Brown to represent himself. Brown, who is now represented by counsel, contends that the trial court did not properly engage him in the colloquy set forth in ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), to determine: (1) whether Brown knowingly, intelligently, and voluntarily waived his right to counsel; and (2) whether Brown was competent to represent himself. Brown further contends that he was not competent to represent himself and that fact should have been evident to the trial court. Because the trial court was not required to "plac[e] form over substance and us[e] 'magic words,'" *see* ***State v. Imani***, 2010 WI 66, ¶26, 326 Wis. 2d 179, 786 N.W.2d 40, when engaging in the ***Klessig*** colloquy and because the trial court otherwise determined that Brown

knowingly, intelligently, and voluntarily waived his right to counsel, and that Brown was competent to represent himself, we affirm.

¶13 As an initial matter, we note that the crux of Brown's claim relies on a criminal defendant's right to conduct his own defense, as set forth in both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution. *See* ***Klessig***, 211 Wis. 2d at 203. However, as the State points out, WIS. STAT. ch. 980 commitments are civil, not criminal, proceedings. *See* ***State v. Post***, 197 Wis. 2d 279, 294, 541 N.W.2d 115 (1995) ("Chapter 980 authorizes the civil commitment of persons, previously convicted of a sexually violent offense, who currently suffer from a mental disorder that predisposes them to repeat such acts."). And therefore, the State contends that Brown has no right to counsel or to self-representation. Brown did not file a reply brief and therefore has not refuted the State's assertion. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted). We need not determine whether the constitutional guarantee applies to ch. 980 commitment proceedings, because even assuming it does, the trial court properly determined that Brown knowingly, intelligently, and voluntarily waived his right to counsel and that he was competent to represent himself.

¶14 Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution guarantee both a criminal defendant's right to counsel and the right to defend oneself. ***Klessig***, 211 Wis. 2d 201-03. The Wisconsin Supreme Court has noted "the apparent tension between these two constitutional rights," stating "'that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned

unless he has been accorded the right to the assistance of counsel.'" ***Imani***, 326 Wis. 2d 179, ¶21 (citation omitted). In order to ensure that the right to counsel is upheld, before a defendant is permitted to represent himself or herself, "the [trial] court must ensure that the defendant[:] (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** "If the [trial] court finds that both conditions are met, the court must permit the defendant to represent himself or herself." ***Id.*** Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact which we review independent of the trial court. ***Id.***, ¶19. Accordingly, we address each inquiry in turn.

A. Knowing, Intelligent, and Voluntary Wavier

¶15 To ensure that a defendant knowingly, intelligently, and voluntarily waived his or her right to counsel, a trial court is required to conduct a colloquy designed to ensure that the 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, and (4) was aware of the general range of penalties that could have been imposed on him.'" *See* ***id.***, ¶23 (citing ***Klessig***, 211 Wis. 2d at 206). We may conclude that a defendant knowingly, intelligently, and voluntarily waived the right to counsel only if the trial court engaged in the colloquy and found that the defendant satisfied all four inquiries. ***Id.*** However, the trial court is not bound by "exact language or 'magic words.'" ***Id.***, ¶26. So long as "the reality of the circumstances dictate the answer," the trial court need not "plac[e] form over substance." ***Id.***

¶16 When determining "whether a defendant knowingly, intelligently, and voluntarily waived the right to counsel, we apply constitutional principles to the facts of the case." ***Id.***, ¶19. And "[w]e review those facts independent of the [trial] court." ***Id.***

¶17 Our review of the record demonstrates that the trial court ascertained that each of the four inquires was satisfied and properly determined that Brown knowingly, intelligently, and voluntarily waived his right to counsel.

¶18 First, Brown's decision to proceed *pro se* was deliberate. Brown expressly told the court on several occasions that he wished to represent himself, including during the following exchange with the trial court:

> THE COURT: … I'm very reluctant to appoint yet another lawyer on this case.
>
> I'm also very reluctant to let you represent yourself unless that's what you want to do and you're sure that's what you want to do.
>
> [BROWN]: That's what I'm sure I want to do.

Moreover, Brown's insistence on filing numerous *pro se* motions while represented by counsel and his rejection of the four attorneys appointed to his case implicitly demonstrate that Brown's clear desire was to represent himself.

¶19 Second, the trial court made sure that Brown was aware of the difficulties and disadvantages of self-representation, explaining to Brown that:

> [WISCONSIN STAT. ch. 980 commitments are] a complicated area of law and even someone who represents themselves in a fairly simple area can run into all sorts of trouble.
>
> As much as you m[a]y not be happy with the lawyers and the decisions they've made, a lawyer may recognize things that you don't recognize and a lawyer may

> not spend a lot of time arguing something that may sound good at the beginning but really has no legal basis once it's looked into.

The trial court then adjourned to permit Brown time to think about whether he wanted to proceed with self-representation. The next day, the court engaged Brown in the following exchange:

> THE COURT: All right. Mr. Brown, I need to interrupt you again for a moment. I don't want to insult your intelligence by asking you questions about whether you understand what a lawyer can do for you. You have had four of them [lawyers]. But I need to be sure about this. I hope to make a decision that I won't have to change later on and I need to try to find a way to get this Chapter 980 petition resolved. Are you satisfied you understand the advantages a lawyer could give you?
>
> ….
>
> Hold on. However much you think you have educated yourself about this, do you understand a lawyer has legal training and experience that might be helpful to you in challenging what the [S]tate wants to do in raising defenses for you? Do you understand that?
>
> [BROWN]: Yep.
>
> THE COURT: If you proceed by yourself and you don't see something, you don't see an objection that ought to be made, you don't see a motion that ought to be made that might be a valid motion or might be a valid objection, that when you proceed by yourself, you've waived the right to bring that later. You can't then go back and say: Well, gee, if I had a lawyer, he would have objected or she would have objected or brought this motion. Do you understand that?
>
> [BROWN]: You still looking at this in the criminal sense. What I'm saying is a trial is double jeopardy. I'm fighting this by motion. If you deny a motion, you know, I'm going to ask you for judgment of conviction or judgment on that so I can go on to the next court with that. I'm not gonna, you know, do this for only a trial, trying to get a doctor, trying to focus on a trial that shouldn't be even commenced in the first place is ridiculous. I'm not going

> to entertain that thought whatsoever. So I understand where you're coming from but I understand my situation.
>
> THE COURT: Do you understand that – Mr. Brown, do you understand that if you represent yourself, you'll then be entitled to – then be entitled to bring motions and make arguments [o]n your own behalf? Do you understand though that you aren't necessarily going to be allowed to bring up issues that have been brought up before and decided by the Court even if they were decided wrongly? Do you understand that?
>
> [BROWN]: True.
>
> ….
>
> THE COURT: You also understand that while I will try to explain why I'm ruling in a certain way, and I might try to do it a little differently if you're by yourself or if you have a lawyer, that I don't have to rule in a way that convinces you that your motion is without merit, that I have to look at the law. I have to make a decision. This is a somewhat complicated law. Anybody can look at these statutes and find sentences here and there that seem to dictate or lead to a certain result but that isn't necessarily the lawful conclusion. And if you represent yourself, you have to accept the rulings that I make whether you agree with them or not. Do you understand that?
>
> [BROWN]: I understand it completely.

¶20 In other words, after the trial court explained to Brown that WIS. STAT. ch. 980 commitment proceedings are complicated and difficult to navigate and that an attorney could help him navigate those complexities, even if he did not like the attorney, Brown remained steadfast in his desire to represent himself, stating "I understand where you're coming from" and "True." While parts of Brown's response, at first glance, appear rambling and incoherent, upon further review it is evident that he did understand the trial court's concerns. He simply did not share them.

¶21 Third and fourth, the trial court ascertained that Brown understood the gravity of the petition against him and was aware of the general range of penalties that could be imposed on him, asking Brown:

> THE COURT: And you understand what is at stake here, that the [S]tate is asking that you be found to be a person subject to Chapter 980? And if that finding is made, if you're found to meet the criteria for a finding you're a sexually violent person, you can be subject to confinement and court orders for a long time including the rest of your life?
>
> [BROWN]: Right.
>
> ….
>
> THE COURT: Let me interrupt you, sir, because – hold on. It's possible you'll win this case. It's possible you'll convince a jury or me that there's a reason not to have the Chapter 980 provisions apply. All I'm talking about at this point is not whether you think you can win but do you understand the consequences if you lose? The Court could enter a commitment order that would specify that you be placed in institutional care. That could be a secure setting and that that [sic] order could last for a long time. I believe it could last for the rest of your life. Do you understand that?
>
> [BROWN]: Yep.
>
> THE COURT: Now, what's your position, not on whether you can win this case but whether you want to proceed without a lawyer?
>
> [BROWN]: I do want to proceed without a lawyer and I do want to present a motion.

¶22 The court explained to Brown, in no uncertain terms, that he could be placed in an institutional facility indefinitely if he was not successful at trial, and Brown expressly stated that he understood. Brown's awareness of a potential lifetime commitment was sufficient to demonstrate that he understood the

seriousness of the charges in the petition against him and that Brown was aware of the general range of penalties against him.

¶23 In summary, we conclude that the trial court properly engaged Brown in a colloquy to determine whether he knowingly, intelligently, and voluntarily waived his right to counsel, and that the trial court properly concluded that Brown was in fact waiving that right.

B. Competent to Represent Oneself

¶24 Next, we turn to whether the trial court properly determined that Brown was competent to represent himself. "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. "In making a determination on a defendant's competency to represent himself, the [trial] court should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.'" ***Id.*** (citation omitted). However, "[a] defendant of average ability and intelligence may still be adjudged competent for self-representation, and accordingly, a defendant's 'timely and proper request' should be denied only where the [trial] court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense.'" ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted).

¶25 When reviewing a trial court's conclusion that a defendant is competent to proceed *pro se*, we defer to the trial court's judgment. ***Id.*** "'It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense.'" ***Id.***

(citation omitted). "Our review is limited to whether the [trial] court's determination is 'totally unsupported by the facts apparent in the record.'" ***Id.*** (citation omitted).

¶26 When concluding that Brown was competent to represent himself, the trial court made the following findings:

> While that threshold standard may be higher than competency to proceed at all in a criminal case, I've never viewed it as a terribly high standard. The law makes it clear that you have the right to represent yourself. I'm not going to try to prejudge Mr. Brown's defenses that he wants to raise but a moment ago he made exactly the right response. [Brown had previously stated that an expert report submitted by the State was hearsay.] Doctor Tyre's report is at this point hearsay. It's an out-of-court statement. If he wants to try to challenge it, he has the right to do so.
>
> I believe he's competent in a sense he's able to understand the basic issues. He's able to speak in his own defense. He may be raising things that are bogus because he doesn't understand them. He may be raising things that are bogus or not properly grounded because he has nowhere else to go. But I cannot at this point judge the legitimacy of those defenses. He seems to be able to raise them and articulate them.
>
> ….
>
> I'm satisfied that forcing him to work with a lawyer is either not going to work because he won't talk to a lawyer or he'll choose to be disruptive in court. Or if not, he'll simply feel that he's being persecuted and no one is really working [o]n his behalf. He's able to speak on his own behalf. He's able to understand the basics of these procedures.
>
> I agree with [the State] that these are relatively complicated legal matters. But I think the right to represent oneself doesn't just include simple allegations. It includes all types of proceedings and I'm not satisfied that these are so complicated that Mr. Brown can't understand them and cannot speak for himself. So I'm going to permit him to do that.

¶27 We conclude that the trial court's determination that Brown was competent to represent himself is supported by apparent facts in the record. *See* ***Imani***, 326 Wis. 2d 179, ¶37. The record contains numerous motions, petitions, and correspondence filed by Brown on his own behalf, while represented by counsel, including, but not limited to: motions to dismiss with corresponding exhibits, petitions for supervisory writs, and a petition for a temporary restraining order. While these filings may have been misguided and poor strategy, they demonstrate that Brown was literate, fluent in the English language, able to navigate the law, able to identify legal issues, and able to articulate his defense. That his defense—which at least in part included the assertion that he was being confused with another sex offender in West Virginia—was unsuccessful, does not make him incompetent to represent himself.

¶28 Furthermore, the trial court had engaged Brown in a discussion over the course of two days, during which time, Brown demonstrated that he was at least of average intelligence and able to communicate his defense. While his responses to the trial court's questions were sometimes off topic, they were not outside the realm of the case. And with redirection from the court, Brown answered the questions posed to him appropriately. Even Attorney Harris, who had represented Brown and acted as his standby counsel, stated that he was "convinced that [Brown] knows the law."

¶29 Moreover, Brown has not articulated "a specific problem or disability" that should have been identified by the trial court that would have prevented him from presenting a meaningful defense. *See* ***Imani***, 326 Wis. 2d 179, ¶37. Brown simply argues in the abstract that his thoughts were rambling and incoherent and demonstrated incompetence. However, the assertion that his thoughts were at times difficult to follow and somewhat off topic, does not

identify "a specific problem or disability" that the trial court should have identified. *See* ***id.*** And without such "a specific problem or disability" the trial court was required to find him competent. *See* ***id.***

¶30 We also reject Brown's contention, without citation to any legal authority, that the trial court was "obligat[ed] to make specific inquiries in order to determine [Brown's] ability and competence to represent himself." Brown contends that the trial court should have held a discussion with Brown regarding "Brown's mental health status, his background, his age, education[,] his ability to grasp legal concepts[,] … [and] Brown's ability to read or write," and further discussed the "burden of proof, … witnesses, … whether … Brown had read and reviewed various expert reports and whether he understood any of the information in those reports."

¶31 Case law only dictates that when "determining whether a defendant is competent to proceed pro se, the [trial] court *may* consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." ***Imani***, 326 Wis. 2d 179, ¶37 (emphasis added); *see also* ***Klessig***, 211 Wis. 2d at 212 (stating only that the trial court should consider the relevant factors). The court does not require the trial court to do so, nor does the case law dictate how the trial court ascertains its information. Here, the trial court's extensive interactions with Brown, both through its review of Brown's previous *pro se* filings and its dialogue with Brown in court, were sufficient to determine that Brown was competent.

CONCLUSION

¶32 Brown's request to represent himself put the trial court in a precarious position. On one hand, Brown had a constitutional right to a fair trial

and perhaps the right to counsel. On the other hand, he may have had a right to represent himself and had expressly stated that he would not cooperate with another appointed attorney. Brown had disposed of four attorneys and even while represented by counsel insisted on filing motions and other correspondence on his own behalf. While perhaps Brown did not present his defense in the same manner in which an attorney would have, it was clear that Brown was making the decision to represent himself with his eyes wide open and that he was competent to do so. The strategy he chose to employ was his to decide and is not ours to question. While WIS. STAT. ch. 980 proceedings are complex, Brown demonstrated an ability to navigate through the law, and the court wisely appointed standby counsel in case Brown wished for assistance. There is little else the trial court could have done and no more that the law required it to do.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.