COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-2508-CR
03-2509-CR
03-2510-CR

Cir. Ct. Nos. 00CM001482
00CM001604
02CM004091

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVAN L. HIGGINBOTHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIELDER, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Ivan L. Higginbotham appeals from an order denying postconviction relief. He contends that the circuit court denied him his

[1] 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.

constitutional right to represent himself. He claims the trial court failed to conduct a colloquy to determine whether his request to represent himself was knowing and voluntary. Because the record shows Higginbotham did not clearly and unequivocally express that he wanted to represent himself, we affirm.

¶2 The parties do not dispute the material facts of the criminal charges. In October 2002, Higginbotham was charged with disorderly conduct, carrying a concealed weapon, resisting or obstructing an officer, and four counts of bail jumping. A state public defender represented him at his initial appearance. When he appeared pro se at the final pretrial conference, the trial court asked him if he wanted a lawyer to represent him. Higginbotham's responses were varied. He repeatedly indicated that he wanted the case resolved that day, with or without an attorney, so he could get "out of this jail." He had spent two months in jail waiting for trial. He initially replied: "If we can get this resolved today, I don't need one." He repeated his wishes later: "Your Honor, I don't need an attorney. I would just as soon as get this resolved today;" and "an attorney, either way, is not going to help me, because with the repeater allegations, with my criminal history, so I would just as soon as get it resolved." Higginbotham, however, also expressed that he wished to have counsel, asking if was there "any way I can have an attorney in here so we can try resolving this?" He also explained that although he had asked to see a public defender, he was told that he would not get one until he provided a financial statement showing that he qualified for one.

¶3 The judge promised he would "do everything" he could "to accommodate" Higginbotham, including talking with the public defender's office to send someone to determine if Higginbotham qualified for assistance. The judge recommended a lawyer represent Higginbotham because of his criminal record.

At the end of the conference, the judge told Higginbotham that there would be a hearing if the public defender's office declined to represent him. Higginbotham accepted these terms, saying, "Sounds good."

¶4 Two months later, Higginbotham appeared with a public defender at his plea and sentencing hearing. He entered pleas of no contest to the charges of disorderly conduct and resisting or obstructing an officer under a plea agreement. He was placed on probation for two years.

¶5 About three weeks later, the State revoked Higginbotham's probation because he was charged with battery and possession of drug paraphernalia, among other things. The trial court granted Higginbotham's attorney's motion to withdraw because client-attorney communications had broken down when the attorney refused to file a writ of certiorari. With the aid of a newly appointed public defender, Higginbotham moved to withdraw his no contest pleas because the trial court failed to conduct a colloquy, violating his constitutional right to represent himself. The trial court denied the motion because the record of the pretrial conference, read in its entirety, showed that it acted "under the distinct impression" that he wanted an attorney. The court also reasoned that Higginbotham entered the no contest pleas knowingly, voluntarily and intelligently with the aid of an attorney. Higginbotham appeals.

¶6 Higginbotham contends that the trial court denied him his fundamental constitutional right of self-representation. He argues that although he said several times that he wanted to represent himself, the court failed to conduct a colloquy to determine if he knowingly and voluntarily waived his right to counsel and whether he was competent to do so. He also contends that the trial court decided for him that he should have an attorney even though he asked to proceed

pro se. Higginbotham urges us to permit him to withdraw his plea, or to remand to the trial court with instructions that it conduct a colloquy.

¶7 Higginbotham's appeal requires us to consider whether the trial court incorrectly denied his constitutional rights, raising a question of constitutional fact, which we review independently as a question of law. ***State v. Cummings***, 199 Wis. 2d 721, 748, 546 N.W.2d 406 (1996) (citation omitted). Questions of constitutional fact are not actually "facts," but require the "application of constitutional principles to the facts as found." ***State v. Woods***, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984), *aff'd*, 794 F.2d 293 (7th Cir. 1986) (citation omitted).

¶8 This case presents an unusual question of whether the trial court denied a defendant's right to self-representation when it did not conduct a colloquy under ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). More often, the question is whether the trial court denied a defendant's right to counsel when it determined that the defendant knowingly and voluntarily waived his or her right to counsel. ***Id.*** at 204. To resolve the issue, we must consider the relationship between these constitutional rights.

¶9 The United States Constitution and the Wisconsin Constitution guarantee defendants the right to counsel. ***State v. Sanchez***, 201 Wis. 2d 219, 228, 548 N.W.2d 69 (1996) (citation omitted). A defendant also has a constitutional right to proceed pro se. ***Faretta v. Cal.***, 422 U.S. 806, 819 (1975); ***Klessig***, 211 Wis. 2d at 203. When a defendant seeks to represent himself pro se, the trial court must conduct a colloquy to prove a knowing and voluntary waiver. ***Klessig***, 211 Wis. 2d at 206; WIS JI-CRIMINAL SM-30 ("When a defendant affirmatively wishes to waive counsel, an inquiry must be conducted to determine whether the

defendant's waiver is voluntarily and understandingly made.") The right to self-representation, however, conflicts with the right to the assistance of counsel, ***Klessig***, 211 Wis. 2d at 203, and is not absolute, ***State v. Oswald***, 2000 WI App 3, ¶28, 232 Wis. 2d 103, 606 N.W.2d 238.

¶10 We do not presume waiver of the right to counsel. ***Klessig***, 211 Wis. 2d at 205 (citation omitted). The State must prove by clear and convincing evidence that the defendant knowingly, intelligently and voluntarily waived counsel. ***Id.*** at 207. A defendant must request, clearly and unequivocally, to represent himself or herself. ***Faretta***, 422 U.S. at 835. When a defendant manages his or her own defense, he or she "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." ***Id.*** Therefore, the right to counsel is in force until waived, while the right to self-representation does not attach until asserted. ***Brown v. Wainwright***, 665 F.2d 607, 610 (Former 5th Cir. 1982)

¶11 We are satisfied that the record shows Higginbotham failed to assert clearly and unequivocally his right to self-representation. He merely expressed his desire to leave jail quickly. While he repeatedly said he did not need an attorney, he also stated he wanted an attorney to have the case resolved that day. He did not expressly waive his right to counsel when the trial court explained that the district attorney would not be able to talk to him unless there was such a waiver. Moreover, he agreed that the judge would contact the state public defender for his assistance. All things considered, Higginbotham's equivocal conduct did not trigger a ***Klessig*** colloquy.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.