COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2794-CR **Cir. Ct. No. 02CF00115**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT H. ROTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: THOMAS H. BARLAND, Judge. *Judgment modified and, as modified, affirmed; order affirmed*.

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

¶1 PETERSON, J. Robert Roth appeals a judgment of conviction resulting from written threats he made to a judge and a public defender. Roth,

who was not represented by an attorney at trial,[1] argues the circuit court erred by not appointing an attorney to represent him. We conclude Roth was not entitled to an appointed attorney and that he waived his right to counsel. Roth further argues that his sentence was excessive because he was sentenced to more than the maximum allowed by law. We agree and commute the sentence to the maximum allowed. Finally, Roth argues he is entitled to a new trial because the case was not fully tried. We disagree with this argument.

BACKGROUND

¶2 In March 2002, Roth wrote a threatening letter to Judge Eric J. Lundell in relation to a child support case. For this, Roth was charged with one count of threats to injure and one count of threat to a judge (counts one and two, respectively). Additionally, Roth wrote three letters to Howard Cameron, Roth's public defender in the child support case, threatening Cameron as well. For these letters, Roth was charged with three additional counts of threats to injure (counts three, four and six), for a total of five felony counts.[2]

¶3 Roth appeared without an attorney at his initial appearance. He stated he intended to get an attorney but did not qualify for public defender representation. At the preliminary hearing, he again appeared without an attorney and again stated he hoped to retain one. At his arraignment, still without an attorney, Roth entered pleas of not guilty and not guilty by reason of mental disease or defect.

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[1] Roth is represented by an attorney in this appeal.

[2] Count five, an additional count of threats to injure, was dismissed before trial.

¶4 A hearing was held later to discuss standby counsel for Roth. The court expressed doubt that Roth was able to represent himself if he failed to hire an attorney, and noted Roth was ineligible for a public defender. The court decided to appoint standby counsel.

¶5 Before the jury trial commenced, the court again discussed with Roth whether he intended to proceed without an attorney. The court again noted that Roth was not eligible for a public defender. Further, the court stated it had reviewed Roth's assets and found Roth was not indigent. The court then asked Roth if he elected to proceed without an attorney. Roth responded that he did not have any choice.

¶6 The following lengthy exchange then occurred between the court and Roth.

> THE COURT: Well, you do have something to say. You have a right to speak for yourself, make your own decisions. I'm attempting to find out whether at this point you are waiving your right under the Constitution to be represented by an attorney and that you are proceeding to represent yourself with the assistance of a stand-by attorney.
>
> MR. ROTH: Yeah. I guess that's all I can do.
>
> THE COURT: Is that what you wish to do?
>
> MR. ROTH: Yeah. That's all I can do.
>
> THE COURT: Well, we've gone around this several times, Mr. Roth.
>
> MR. ROTH: Yes, I know.
>
> THE COURT: I've repeatedly informed you of your right to be represented by an attorney and have done what I could to see to it that if you wish to exercise that right, that you secure an attorney. Now, is it your wish to proceed today without an attorney except for the assistance of a stand-by attorney?

MR. ROTH: Under advisement, no. It wouldn't be my wish to proceed today. It was just last night that I got some of the stuff to go over and I haven't had time to.

….

MR. ROTH: If the court wants to let me muddle through it and kind of put it together as we go, I don't know how long it will take me to get through it all but I'll do my best.

THE COURT: Well, are you telling the court that you don't wish to proceed today without an attorney?

MR. ROTH: Well, without an attorney possibly and then without having sufficient time to go through and reorganize some of the stuff that I just got last night.

….

THE COURT: Mr. Roth, is the reason that you are telling me now you're not prepared simply because you got those transcripts last night that you have been talking about?

MR. ROTH: Yeah. And I haven't even gotten all of them yet. And under advisement by my attorney or by my stand-by counsel, he says the complexity of this I should have an attorney to help at least set up a presentation or organize a presentation. He says that there are definitely issues here and, but he thinks they are too complicated for me to handle personally.

THE COURT: So you're telling me now you've come to realize that your case is complex enough that you need an attorney to represent you?

MR. ROTH: No. I do need more time, though ….

….

THE COURT: I want to get back, Mr. Roth, to the basic question, and that is whether you wish to proceed today without an attorney other than a stand-by attorney seated next to you.

MR. ROTH: Yeah, I guess so.

THE COURT: Well, we can't guess, Mr. Roth. I need, I need a clear cut yes or no from you.

> MR. ROTH: … Yeah, I want to get this over with one way or another, so it don't matter. I'll go ahead.
>
> THE COURT: You have a Constitutional right to be represented by an attorney. Do you wish to waive or give up that right this morning?
>
> MR. ROTH: To get this over with, yeah, I'll do that. …
>
> THE COURT: Well, do you understand that if you need time to prepare, the court will give you that time ….
>
> ….
>
> MR. ROTH: Yeah.
>
> THE COURT: Do you understand that?
>
> MR. ROTH: Yes, I do.
>
> THE COURT: Now, do you wish for the purposes of the trial this morning to waive or give up your Constitutional right to be represented by an attorney?
>
> (Discussion held off the record by stand-by counsel and defendant)
>
> ….
>
> MR. ROTH: Yeah. I'll waive my right to an attorney.

¶7 The jury convicted Roth on all five counts. At sentencing the court again addressed whether Roth wanted an attorney. Roth again indicated he wanted one but claimed he could not afford one. For sentencing, counsel was appointed. On counts one and two, Roth was sentenced to concurrent terms of seven years and six months in prison followed by two years and six months of extended supervision. On counts three and four, Roth was sentenced to the same length prison and extended supervision terms as in counts one and two, to be served concurrent with each other but consecutive to counts one and two. On count six, Roth was sentenced to a withheld sentence of ten years' probation, consecutive to counts three and four.

DISCUSSION

A. Appointed Counsel

¶8 Roth first mentions in a heading to an argument that "the trial court erred by appointing standby counsel to represent [him] when [he] indicated that he wished counsel but could not afford one." However, he does not develop this argument beyond this one sentence. In any event, we conclude the court properly determined Roth was not eligible to have an attorney appointed for him.

¶9 Roth did not qualify for a public defender. He informed the court he wanted an attorney but could not afford one. The right to appointed counsel does not hinge on the indigency criteria of the public defender. ***Pirk v. Dane County***, 175 Wis. 2d 503, 506, 499 N.W.2d 280 (Ct. App. 1993). If a criminal defendant does not meet the public defender criteria, the trial court must nevertheless determine whether the defendant is indigent, and if he or she is, the trial court should appoint counsel from the private bar. ***Id.*** Indigency is primarily a factual question. ***State v. Dean***, 163 Wis. 2d 503, 513, 471 N.W.2d 310 (Ct. App. 1991). We must accept a finding of fact by a trial court unless it is clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).

¶10 Roth and his wife owned a hobby farm, two trucks, two snowmobiles, tools, and other assets. The court determined that his assets were sufficient for him to secure funds to retain an attorney. Thus the court concluded Roth was not entitled to appointed counsel. Roth does not challenge the court's finding that he was financially able to afford counsel and thus has not shown the court's decision was clearly erroneous.

B. Waiver of Counsel

¶11 Roth argues that he did not knowingly and voluntarily waive his right to counsel. Whether a defendant has waived his right to counsel requires an application of constitutional principles to the facts of a case, which we review independently of the trial court. ***State v. Woods***, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984). A criminal defendant may waive his or her right to counsel in criminal trial court proceedings, provided the record reflects that the waiver is knowingly and voluntarily made. ***State v. Klessig***, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997).[3]

¶12 A trial court's ruling on whether a waiver was knowing and voluntary presents mixed questions of fact and law. ***Reckner v. Reckner***, 105 Wis. 2d 425, 435, 314 N.W.2d 159 (Ct. App. 1981). We will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). The application of the facts to the constitutional principles is a question of law that we review independently. ***Id.*** at 137-38.

¶13 The trial court must engage in a colloquy with the defendant to establish a knowing and voluntary waiver. The colloquy must be 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

[3] A defendant must also be competent to proceed without an attorney. Regarding the competency element, although Roth states that he must be competent to proceed pro se, he does not develop this argument. We decline to develop the argument for him in order to resolve the issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Thus, we only address the first element – whether Roth knowingly, intelligently and voluntarily waived his right to counsel.

aware of the seriousness of the charge or charges against him or her, and (4) was aware of the general range of penalties that could have been imposed upon him or her. ***Klessig***, 211 Wis. 2d at 206. The collective ongoing record may constitute the functional equivalent of a colloquy. ***State v. Ruszkiewicz***, 2000 WI App 125, ¶30, 237 Wis. 2d 441, 613 N.W.2d 893.

¶14 First, Roth made a deliberate choice to proceed without counsel. On numerous occasions, the court spoke with Roth regarding whether he was waiving his right to counsel. The court told Roth that he had a constitutional right to an attorney and that it would be in Roth's best interests to secure an attorney. In fact, the court repeatedly encouraged him to retain counsel. Yet, Roth never took any action to find an attorney. In fact, throughout the proceedings, Roth stated he would proceed without an attorney. At the preliminary hearing, the court asked if Roth wanted to proceed without an attorney. He answered, "Yes." The court again asked Roth at his arraignment if he intended to represent himself. Roth responded, "Yes, I do." Finally, before trial began, the court specifically asked Roth if he was waiving his right to an attorney. When Roth answered that he "guessed so," the court stated that it needed a yes or no answer. Roth then discussed the issue with his standby counsel, and stated, "Yeah, I'll waive my right to an attorney."

¶15 Second, Roth was aware of the difficulties and disadvantages of self-representation. The court explained the complexity of the case, especially because of Roth's plea of not guilty by reason of mental disease or defect. The court told Roth that due to his plea "then more than ever you may need an attorney, because we're moving into a very technical, very specialized part of the law, and there is [sic] some additional steps that are involved in such a case."

¶16 Finally, Roth was aware of the seriousness of the charge and the potential penalty that could result. At the preliminary hearing, the court stated it would give Roth time to find an attorney:

> And you may represent yourself if you wish to, but this is a very serious case. The – the potential confinement is lengthy. And you would be well advised to secure legal counsel. It appears you can afford to do so. I want to give you the time to acquire counsel.

At Roth's arraignment, that court informed him that the maximum penalty on each of the charges was a fine of $10,000 and imprisonment of ten years. The court asked if Roth understood and Roth responded that he did.

¶17 The court did not make a specific finding that Roth waived his right to an attorney. Nevertheless, the record shows, and we are satisfied, that Roth knowingly and voluntarily waived his right to counsel.

C. Sentencing

¶18 Roth argues his sentence was excessive because it exceeded the maximum allowed by statute. Roth's offenses are class D felonies. WISCONSIN STAT. § 973.01(2)(b)4[4] provides that before February 1, 2003, the term of confinement in prison for class D felonies could not exceed five years. Roth was sentenced to seven and a half years' confinement in prison on each of the counts. Thus, the sentence on each count exceeds the maximum allowed by statute.

¶19 WISCONSIN STAT. § 973.13 provides that when a court imposes a penalty in excess of that permitted by law, the excess portion of the sentence is

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

void. ***State v. Robles***, 157 Wis. 2d 55, 64, 458 N.W.2d 818 (Ct. App. 1990). The sentence shall be commuted, without further proceedings, to the maximum permitted by law. ***Id.***

¶20 The State points out that because Roth was convicted of five felonies, he could have been sentenced to twenty-five years' confinement in prison on all charges. Because the court imposed a total confinement of fifteen years, the State argues the period of confinement is within the maximum allowed. The State argues that the court intended the total sentence to be within the maximum allowable for all counts, and that this intended sentence is valid and therefore not erroneous.

¶21 The case the State cites regarding a court's intended sentence, ***State v. Walker***, 117 Wis. 2d 579, 345 N.W.2d 413 (1984), is inapplicable here. In ***Walker***, the defendant was sentenced to three years and two months in prison. The court said it was taking into account time served and "that having been taken into consideration there will be no credit for time previously served." ***Id.*** at 581. The defendant argued that he was entitled to three years' credit and that amount should be deducted from the sentence. However, our supreme court concluded that the trial court intended to impose a lawful sentence and that it took the three years' credit into account when it ordered the sentence:

> When the trial judge represented that no credit was to be given for time served, we assume he only meant to imply that he had already subtracted that amount when he announced the three-year sentence. If that time had already been subtracted, it would have been accurate to state that no *further* time-served credit would be given because otherwise it would amount to a double credit.

Id. at 584-85. The State argues we should do the same here and conclude the circuit court intended a lawful sentence that was within the cumulative maximum for the charges. We disagree.

¶22 Before discussing the trial court's intent in ***Walker***, the supreme court stated that "when it is clear what the trial court intended to do when it imposed an otherwise improper sentence, we have modified the sentence to carry out the intent of the trial court while bringing the sentence into accordance with the applicable law." ***Id.*** at 584. The supreme court concluded the record supported the conclusion that the trial court took into account the time the defendant served. ***Id.*** Here, there is nothing in the record indicating the court was focusing on the total sentence rather than the sentence on each individual charge.

¶23 At sentencing, the court went through each of the five counts. Regarding the first count the court stated,

> the total length of your sentence is for ten years. Your initial term of confinement in prison is seven years five months. The maximum time you will serve on extended supervision is two years five months.
>
> I believe that to be the maximum that can be imposed by law since I'm required to, in imposing sentence, allow at least twenty-five percent of your sentence under extended supervision.[5]

The court then went on to impose the sentences on the remaining counts. Thus, the court based Roth's period of confinement on a calculation of seventy-five

[5] Although the court stated the term of confinement was seven years five months and the term of extended supervision was two years five months, the judgment of conviction shows Roth was in fact sentenced to seven years six months in prison followed by extended supervision of two years six months.

percent of ten years, rather than on the correct maximum as set forth in WIS. STAT. § 973.01(2)(b)4.

¶24 Alternatively, citing ***State v. Hanson***, 2001 WI 70, 244 Wis. 2d 405, 628 N.W.2d 759, the State argues that we should remand for a determination of the appropriate penalty. Hanson was charged with operating a motor vehicle after his license had been revoked or suspended, as a habitual traffic offender. After the complaint was issued, Hanson sought rescission of his habitual traffic offender status, which was granted as part of a legislative overhaul of the operating a motor vehicle after license revocation or suspension offense. Hanson subsequently pled no contest to the charge, as a habitual traffic offender, and he was fined and sentenced to twenty days in jail. However, the circuit court did not indicate whether the basis of Hanson's sentence was the result of the operating a motor vehicle after his license had been revoked or suspended conviction or the habitual traffic offender penalty enhancer, or both. Hanson challenged the conviction, arguing that due to the rescission of his habitual traffic offender status, he should only have been charged with a civil forfeiture. ***Id.***, ¶¶ 3-8.

¶25 The supreme court concluded that even though Hanson pled no contest to the operating a motor vehicle after his license had been revoked or suspended charge with the habitual traffic offender enhancer attached, he still should not have been imposed with a criminal penalty due to the rescission of his habitual traffic offender status. However, the court noted there could have been another basis for a criminal conviction. ***Id.***, ¶39. The court stated that,

> If there is no additional basis for the imposition of a criminal sentence, the criminal penalty is a sentence in excess of that authorized by law and is invalid under Wis. Stat. § 971.13. Because the state of the record, however, we are unable to determine whether such additional basis

> exists. We thus must remand this case to the circuit court for a determination of the appropriate penalty ….

Id., ¶47.

¶26 In ***Hanson***, remand was necessary because the supreme court was unable to determine the basis for the trial court's sentencing. Here, there is no uncertainty in the record that would require us to remand. We know the basis for the court's sentence. Thus, pursuant to WIS. STAT. § 973.13 we commute the sentence without further proceedings. *See* ***Robles***, 157 Wis. 2d at 64.[6]

D. New Trial

¶27 Roth argues he is entitled to a new trial because the real controversy was not fully tried because Roth was unable to effectively present and argue his case because he did not have an attorney. However, we have concluded Roth waived his right to counsel. To allow a defendant a new trial for this reason "would encourage defendants to proceed pro se believing that they would have an opportunity to have a second trial with counsel if they were dissatisfied with the first verdict." ***State v. Clutter***, 230 Wis. 2d 472, 477, 602 N.W.2d 324 (Ct. App. 1999). Roth is not entitled to a new trial. Consequently, Roth's sentence for each conviction is modified to five years' initial term of confinement in prison followed by five years' extended supervision. The sentences on counts one and two are concurrent with each other. The sentences on counts three and four are concurrent with each other and consecutive to the sentences on counts one and two.

[6] Roth also argues that even fifteen years in prison is excessive because he has no violent history and has mental health issues. Thus, he contends the sentence is disproportionate. However, Roth cites no legal authority for his proposition. Because he has not developed this argument, we will not develop it for him in order to resolve the issue. *See* ***Pettit***, 171 Wis. 2d at 646-47.

By the Court.—Judgment modified and, as modified, affirmed; order affirmed.

Not recommended for publication in the official reports.