COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3241-CR **Cir. Ct. No. 01CF005077**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. ANDERSON,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. John Anderson appeals from a judgment convicting him of two counts of first-degree sexual assault and one count of kidnapping, contrary to WIS. STAT. §§ 940.225(1)(b) and 940.31(1)(a) (1995-96). He also appeals from an order denying his postconviction motion for relief from judgment. He argues that the trial court erroneously "required" Anderson to

represent himself, and that trial counsel was ineffective for not correcting Anderson's "mistaken belief" that counsel would provide ineffective assistance if required to begin trial immediately. We reject Anderson's arguments and affirm the judgment and order.

BACKGROUND

¶2 In September 2001, Anderson was charged with two counts of first-degree sexual assault and kidnapping after the State matched Anderson's DNA with evidence involving a reported abduction and rape from 1995. Counsel was appointed for Anderson. His first attorney moved to withdraw in November 2001, indicating that Anderson had told him that Anderson did not believe the attorney was representing him well. At the hearing on counsel's motion to withdraw, Anderson told the trial court that he wanted to represent himself, with standby counsel available. The trial court said it would consider Anderson's request in the future and ordered that new counsel be appointed to represent Anderson.

¶3 Anderson subsequently sent the trial court a letter, again asking to proceed *pro se*. He wrote:

> I have stressed that I intend on representing myself. It's the only way I will go to trial. I demand to exercise my constitutional rights to proceed pro se; and represent myself. I would appreciate a "standby" counsel to assist me….

(Capitalization in original omitted.)

¶4 At a hearing in December 2001, Anderson appeared with his new trial counsel. Trial counsel told the trial court that Anderson had indicated he wanted to represent himself. The trial court considered Anderson's request to proceed *pro se*. It noted that Anderson had two separate cases pending before the

trial court, and that it had already considered Anderson's request to represent himself in the other case. In considering that request, the trial court learned that Anderson had represented himself at two jury trials in the past. The trial court distinguished the two prior cases, noting that this case involved the complex science of a DNA match. The trial court held that because there were complicated issues related to the admission of DNA evidence, Anderson would not be able to represent himself. The trial court denied Anderson's request.

¶5 Following the hearing, Anderson wrote to the trial court, again asking to proceed *pro se*. He stressed that he was confident he could represent himself and stated that he would not allow anyone, even Johnny Cochran, to represent him in this matter.

¶6 Anderson's second attorney moved to withdraw, indicating that Anderson did not want the attorney's representation. Counsel indicated that the public defender's office had agreed to appoint a third attorney. At a January 2002 hearing on counsel's motion to withdraw, Anderson reiterated his desire to proceed *pro se*. The trial court again denied Anderson's request, explaining that although Anderson was intelligent enough to proceed *pro se*, the court would not allow it because of the complex legal issues in this case. Counsel was allowed to withdraw.

¶7 At a status conference in late January 2002, Anderson's new attorney promptly informed the trial court that Anderson had told him he did not want the attorney's assistance. The parties discussed the issue at length, including the possibility that if Anderson did not have appointed counsel, the public defender's office may not pay for the services of a DNA expert. The trial court concluded that Anderson could not represent himself, stating: "[I]t would be a

miscarriage of justice to essentially allow you to proceed pro se. It would be a miscarriage of justice to allow this case to proceed without at least having the opportunity of obtaining the expertise of an expert to review the DNA evidence." The case was set for trial in April 2002.

¶8 On April 12, the parties appeared before the trial court for a motion hearing on several evidentiary matters. Counsel moved the trial court to dismiss the case against Anderson because there had been numerous discovery problems. The trial court denied the motion, ordered the State to provide the missing information and continued the motion hearing.

¶9 On April 23, trial counsel filed a written motion (dated April 21) to dismiss the case, arguing that the State had still not provided all necessary discovery. Counsel also indicated that he had received some information from the State only one business day before trial, which did not allow him sufficient time to review it. Counsel states, in the motion, that Anderson's defense would not be "constitutionally sufficient" if the trial were to begin as scheduled.

¶10 On April 23, the trial court heard Anderson's motion to dismiss. Counsel argued, in the alternative, that the trial court should adjourn the trial date and release Anderson. The trial court declined to dismiss the case, concluding that none of the alleged errors by the State were egregious enough to justify dismissal.[1] The trial court then gave Anderson two choices: start the trial or adjourn it. Anderson elected to start the trial, rather than waive his speedy trial demand.

[1] Anderson has not appealed the trial court's determinations with respect to the State's alleged discovery violations. Therefore, we do not address those determinations on appeal.

¶11 Trial counsel then asked the trial court to again consider Anderson's request to proceed *pro se* with standby counsel. Trial counsel argued that because the defense had decided not to call a DNA expert, the case was less complicated and Anderson should be allowed to represent himself. Counsel argued:

> I have had the ability to see that he is able to conduct legal research. He is able to develop strategy and develop issues for trial on his own. He has essentially asked me at times to go in a certain direction, and that's what I have done. I don't believe his defense would be hampered at all by allowing him to represent himself if he so desires.

¶12 The trial court asked Anderson whether he wanted to be represented by a lawyer. Anderson responded:

> Judge, I would. You know, [trial counsel] is a good attorney to me, but [he] has indicated on the record that … in some respects that he would be ineffective assistance of counsel if we were to proceed with trial today and because of the State's recklessness, but because of that, I have … to represent myself. Now, somebody got to be effective.

Following this statement, the trial court engaged Anderson in a detailed colloquy about his desire to proceed *pro se*. In answering the trial court's questions, Anderson on several occasions qualified his desire to represent himself, indicating that his desire was based in part on his belief that he "wouldn't be getting effective assistance of counsel" if his trial counsel represented him. Nonetheless, Anderson indicated that he wanted to represent himself.

¶13 In response to the colloquy, the State expressed its concerns that Anderson's interest in proceeding *pro se* was conditioned on his belief that he would not receive effective assistance of counsel if the trial began immediately. The State was also concerned because Anderson had indicated that if given the option, he would prefer to adjourn the trial date and be released until the trial. The

State suggested that the trial court find good cause to continue the trial date and deny Anderson's request to represent himself.

¶14 The trial court again questioned Anderson about his desire to start the trial. The trial court expressed concern that Anderson kept "trying to sort of bury this sort of procedural landmark in this case by saying that somehow you're being forced into going to trial." To remedy this concern, the trial court decided to postpone the trial by one week, thereby allowing Anderson and trial counsel to complete their investigation. The trial court indicated that on the day of trial, after pretrial preparations and motions were completed, it would likely allow trial counsel to withdraw and be appointed standby counsel for Anderson, who would then be allowed to represent himself.

¶15 On April 29, the parties appeared for trial. The trial court noted that it still intended to have trial counsel handle the final pretrial motions and would likely allow Anderson to represent himself at trial. The trial court made its final evidentiary rulings and the parties returned on April 30 to begin the trial. The trial court told Anderson that it would allow him to represent himself and discussed how the trial would be conducted. Trial counsel was appointed to serve as Anderson's standby counsel.

¶16 Anderson conducted his own defense, which included opening and closing statements, witness examination and the presentation of a defense. He consulted with standby counsel during the proceedings. Ultimately, the jury returned a guilty verdict on all counts. Trial counsel was reappointed to represent Anderson at sentencing. Anderson was sentenced to an indeterminate term of

forty years on each charge, to be served consecutively to each other and to any other sentences previously imposed.[2]

¶17 Postconviction counsel was appointed and filed a motion for a new trial, alleging that Anderson should not have been allowed to represent himself at trial and that he was denied the effective assistance of counsel. The trial court denied the motion and this appeal followed.

DISCUSSION

¶18 Anderson argues that he is entitled to a new trial because he should not have been allowed to represent himself. Specifically, he argues that: (1) he did not unequivocally waive his right to counsel; (2) the trial court erroneously forced Anderson to choose between representing himself, having ineffective assistance of counsel and waiving his speedy trial demand; and (3) trial counsel was ineffective for failing to correct Anderson's "mistaken belief" that trial counsel would be ineffective if forced to proceed on the scheduled day of trial. We reject these arguments and affirm the judgment and order.

¶19 A criminal defendant may waive his or her right to counsel in criminal trial court proceedings, provided the record reflects that: (1) the waiver is knowingly, intelligently and voluntarily made, and (2) the defendant is competent to proceed *pro se*. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). The trial court must engage in a colloquy with the defendant to establish a knowing and voluntary waiver. ***Id.*** at 206. The colloquy must be designed to

[2] Because Anderson committed the offenses in 1995, the sentencing revisions of truth-in-sentencing were not applicable. *See* 1997 Wis. Act 283, § 419, creating Wis. Stat. § 973.01 (truth-in-sentencing applies to felonies committed on or after December 31, 1999).

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 or her; and (4) was aware of the general range of penalties that could have been imposed upon him or her. ***Id.*** Whether a defendant has knowingly, intelligently and voluntarily waived his or her right to counsel requires the application of constitutional principles to the facts of the case, which we review independent of the trial court. ***Id.*** at 204.

¶20 If a court determines that the defendant knowingly, intelligently and voluntarily waived the right to the assistance of counsel, the court must next determine whether the defendant is competent to represent himself or herself. ***Id.*** at 214. Factors to consider in making this second determination include "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his [or her] ability to communicate a possible defense to the jury." ***Id.*** at 212 (citation omitted).

¶21 Anderson does not argue that he lacked competence to represent himself. Rather, he contends that his waiver of counsel was invalid because he did not "unequivocally" waive his right to counsel, citing ***State v. Johnson***, 50 Wis. 2d 280, 284, 184 N.W.2d 107 (1971) (waiver of counsel "must be definite, unequivocal and unconditional"). He argues that his waiver was "unreservedly conditional" on his belief that he had no choice but to either try the case himself, allow ineffective counsel to try the case, or waive his speedy trial demand.

¶22 Anderson also argues that the trial court should not have forced him to either waive the speedy trial deadline or proceed *pro se*. He contends: "Faced with this conflict, the trial court could have exercised its discretion in such a way

as to rule that [Anderson's] right to effective and prepared counsel outweighed the right to a speedy trial and adjourned the matter to allow counsel additional time to prepare."

¶23 In response, the State argues first that the term "unequivocal" used in ***Johnson*** is synonymous with the language "deliberate choice" that is used in ***Klessig***. *See* ***Klessig***, 211 Wis. 2d at 206. The State contends that the record demonstrates that Anderson made a deliberate choice to proceed *pro se*. Further, the State argues that even if Anderson was forced to make a difficult choice to try the case himself, proceed with counsel who wanted more time to prepare, or waive his speedy trial, his waiver is nonetheless valid. Citing ***State v. Hall***, 103 Wis. 2d 125, 147-48, 307 N.W.2d 289 (1981), the State asserts that the Constitution does not forbid requiring a criminal defendant to make difficult choices or to choose between exercising one right and waiving another.

¶24 We conclude that the record demonstrates that Anderson knowingly, intelligently and voluntarily waived his right to counsel. Anderson had been attempting for months to be allowed to represent himself. The record clearly demonstrates that Anderson was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against him, and the general range of penalties that could be imposed on him. *See* ***Klessig***, 211 Wis. 2d at 206. Anderson's representations to the trial court on April 23 were consistent with statements he made on numerous occasions, over the course of seven months, as the trial court engaged in colloquies with Anderson concerning his desire to proceed *pro se.*

¶25 Anderson asserts that he did not make an "unequivocal" choice to proceed without counsel, *see* ***Johnson***, 50 Wis. 2d at 284, because he was forced

to make tough choices. Anderson may not have been pleased that he had to make a choice, but he clearly made a deliberate and unequivocal choice to waive his right to counsel. We agree with the State that making Anderson choose to represent himself, allow trial counsel to represent him, or give up his speedy trial does not render Anderson's decision any less deliberate. *See* ***Hall***, 103 Wis. 2d at 147-48.

¶26 Finally, Anderson contends that he is entitled to a new trial because trial counsel erroneously failed to correct Anderson's "mistaken belief" that if trial counsel had to try the case as scheduled, trial counsel would provide ineffective assistance. To prevail on his ineffective assistance claim, Anderson must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, he must show a reasonable probability that the deficient performance adversely affected his defense such that it undermines our confidence in the outcome. *See* ***id.*** at 694.

¶27 The State argues that Anderson cannot show deficient performance because there is no factual basis for Anderson's claim. It explains that trial counsel's written motion explicitly stated that counsel believed his representation would not be "constitutionally sufficient" if the trial began as scheduled, and that counsel's statements at the April 23 motion hearing were consistent with that assertion. The State contends that in the absence of a statement in the record or an affidavit from counsel indicating that he actually believed otherwise on April 23, there was no "mistaken belief" to correct.

¶28 In response, Anderson contends that a subsequent statement by trial counsel on April 29 is proof that trial counsel did not truly believe on April 23 that he would be ineffective if the trial began that day. Trial counsel stated:

> [W]e raised the issue the last time we were present in court, and it was characterized to some degree that it would hamper the defense and create a situation of ineffective assistance of counsel.
>
> I believe that is overstating the issue. Where we stand at this point is that those discovery issues have still not been resolved, and I believe it would be a more effective approach to continue the trial to a later date and have those issues resolved prior to beginning.

¶29 We reject Anderson's argument. In the written motion filed with the trial court on April 23, trial counsel explicitly stated that Anderson's defense would not be constitutionally sufficient if the trial was not delayed. Counsel's statements on April 29 are insufficient proof that on April 23 he actually believed that he could provide an effective defense. In the absence of such proof, there was no need for trial counsel to correct Anderson's belief that trial counsel would be ineffective. Anderson's ineffective assistance claim fails.

By the Court.—Judgment and order affirmed.

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