COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2796-CR **Cir. Ct. No. 2008CF6190**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD DALE MASON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and DENNIS R. CIMPL, Judges.[1] *Reversed and remanded for further proceedings.*

Before Curley, P.J., Fine and Brennan, JJ.

[1] The Honorable M. Joseph Donald handled the initial appearance and status conference. The Honorable Dennis R. Cimpl presided over the preliminary examination and all subsequent proceedings.

¶1 FINE, J. Richard Dale Mason, Jr. appeals the judgment entered after a jury found him guilty of burglary of a building or dwelling. *See* WIS. STAT. § 943.10(1m)(a). He also appeals the adverse part of the trial court's order denying his motion for postconviction relief.[2] Mason argues that the trial court erred "by denying [his] repeated requests to represent himself." We reverse and remand for further proceedings consistent with this opinion.

I.

¶2 The State charged Mason with burglary for stealing a lawn mower and binoculars from a garage. At his initial appearance before a court commissioner, Mason said that he did not want a public defender to represent him because, he asserted, "I'm better off without one":

> THE COURT: Why do you think that?
>
> THE DEFENDANT: … Every time I have one of them I end up in jail, prison.

¶3 The commissioner then asked Mason several questions about Mason's desire to not have a lawyer, and then said that it found that Mason "knowingly and voluntarily and intelligently waived his right to have counsel at least at this court appearance." Mason again appeared *pro se* at a status conference before the Honorable M. Joseph Donald a week later. The trial court asked him: "Do you plan on representing yourself?" Mason responded, "Yes, sir."

[2] Mason's motion for postconviction relief asserted: (1) that the trial court erred by not letting him represent himself at the trial; and (2) that the trial court should not have imposed a DNA surcharge as part of Mason's sentence. The trial court vacated the DNA surcharge, but denied that it had erred by not permitting Mason to represent himself.

¶4 Mason's case was assigned to a different trial judge as a result of judicial rotation. Mason told the new judge that he wanted to represent himself. The trial court tried to convince Mason that he needed the help of a public defender and, ultimately, after ten transcribed pages, Mason agreed to talk to a public defender. He did not, however, and again went to court for a status conference without a lawyer. The trial court tried again to tell Mason he needed a lawyer. Mason said he wanted "to have this case transferred to" "[t]he other judge[,]" because he did not "need a public defender with him." After a "[d]iscussion off the record," the trial court announced: "I will talk to the public defender to see if we can get somebody in the courtroom to interview him."

¶5 The next docket entry on the same day as the status conference reports that a lawyer told the trial court that Mason qualified to have the public defender appoint a lawyer for him. The docket entry, however, notes that Mason was not then in court. The matter was then set for a preliminary examination.

¶6 Two days before the scheduled preliminary examination, the State Public Defender appointed Theodore Bryant-Nanz, Esq., to represent Mason. Mason and Bryant-Nanz appeared for the preliminary examination, but, one month later, the trial court granted Bryant-Nanz's motion to withdraw. The State Public Defender then appointed Scott Obernberger, Esq., to represent Mason. Obernberger later appeared at a status conference without Mason and told the trial court that Mason wanted a jury trial and that "Mason may wish to renew what was his previous request to represent himself."

¶7 At the next court hearing, Obernberger moved to withdraw because Mason wanted to represent himself. The trial court asked: "you want a new

lawyer?" Mason answered: "No, I don't want any more lawyers." … "I don't need one." The trial court then asked Mason about his decision:

> THE COURT: Sir, you are facing $25,000 in fines and imprisonment for not more than twelve and a half years. You want to represent yourself?
>
> THE DEFENDANT: Yes.
>
> THE COURT: What sort of training have you had, sir?
>
> THE DEFENDANT: I have been in court before and I have done it before.
>
> THE COURT: You go to law school?
>
> THE DEFENDANT: No, I don't need to go to law school.
>
> THE COURT: What is your educational background?
>
> THE DEFENDANT: Three colleges.
>
> THE COURT: Three colleges? Where did you go to college?
>
> THE DEFENDANT: M.S.O.E.
>
> THE COURT: What did you major in?
>
> THE DEFENDANT: Foundry maintenance.
>
> THE COURT: Where else did you go?
>
> THE DEFENDANT: MATC, Accounting 1 and 2; and Glen Park, retail sales. A year of typing, two and a half years psychology, I was the only one who got perfect scores on the test.
>
> THE COURT: You have any legal classes?
>
> THE DEFENDANT: No.
>
> THE COURT: How do you expect to handle the trial, sir?
>
> THE DEFENDANT: I been in court before.

THE COURT: How do you mean?

THE DEFENDANT: I been in court trials and told the attorney what to say and what to ask.

THE COURT: Have you ever represented yourself in a court trial?

THE DEFENDANT: If he can ask, why can't I?

THE COURT: How about a jury trial, you represent yourself?

THE DEFENDANT: They walked me to the bullpen, when he shut the door, when I walked from here to there he opened it and they said not guilty.

THE COURT: Who did?

THE DEFENDANT: The jury.

THE COURT: So you had a lawyer that was able to have you acquitted at a jury trial?

THE DEFENDANT: Yes, he was there.

THE COURT: The lawyer did the work, the lawyer made all of the statements to the jury, the lawyer asked all the questions; you gave him input but the lawyer did all of that, right?

THE DEFENDANT: I wrote down the stuff for him to ask.

THE COURT: Fine, you can do that with Mr. Obernberger.

THE DEFENDANT: I don't need him.

THE COURT: Yes, you do.

THE DEFENDANT: No, I do not.

THE COURT: Sir, I have to, under the law, determine whether or not you are competent to proceed pro se.

THE DEFENDANT: I have been told that I was competent enough to represent myself ….

> THE COURT: Who told you that?
>
> THE DEFENDANT: That woman judge ….
>
> THE COURT: Here in Milwaukee County you were allowed to represent yourself?
>
> THE DEFENDANT: Yeah ….
>
> THE COURT: What kind of case was it, sir?
>
> THE DEFENDANT: I forget, retail theft, I think. …
>
> THE COURT: [Was it Judge] Rebecca Dallet.
>
> THE DEFENDANT: That's her name.

The trial court then told Obernberger: "I am not letting you go. He tells me that another judge let him represent himself, he hasn't given me any indication that he is capable of handling a jury trial on a serious felony." (Paragraphing altered.) "I am not going to let you withdraw, we have a jury trial set on this matter August 17." The trial court then told Mason: "You better start cooperating with your lawyer because Mr. Obernberger is going to represent you."

¶8 In June of 2009 before the trial, Obernberger requested a competency examination based on a head injury Mason suffered in 1984. The trial court granted the request. Mason was found competent to stand trial. Obernberger renewed his motion to withdraw in September of 2009, but the trial court denied it. Obernberger asked to be released again three more times because Mason wanted to represent himself. The trial court denied each request. As we have seen, the jury found Mason guilty.

II.

¶9 A defendant has a constitutional right to represent him- or herself. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716, 720 (1997). When a defendant wants to invoke his constitutional right to represent himself, the trial court must do two things: first, the trial court must make sure that the defendant: "has knowingly, intelligently and voluntarily waived the right to counsel," and second, the trial court must make sure the defendant "is competent to proceed pro se." ***Id.***, 211 Wis. 2d at 203–204, 564 N.W.2d at 720. A trial court has discretion whether to allow a defendant to go to trial without a lawyer, and has "sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." ***Pickens v. State***, 96 Wis. 2d 549, 569, 292 N.W.2d 601, 611 (1980), *overruled on other grounds by* ***Klessig*** (requiring "a colloquy in every case where a defendant seeks to proceed pro se") 211 Wis. 2d at 206, 564 N.W.2d at 721. Whether Mason was denied the constitutional right to self-representation, however, is a question that we review *de novo*. *See* ***id.***, 211 Wis. 2d at 203–204, 564 N.W.2d at 720.

¶10 The first ***Klessig*** step requires the trial court to ensure that the defendant: (1) is deliberately choosing to go to trial without a lawyer; (2) knows the "difficulties and disadvantages of self-representation"; (3) is aware of the seriousness of the charges against him; and (4) knows "the general range of penalties" that he faces, so that any waiver of a lawyer "was knowing, intelligent, and voluntary." ***Id.***, 211 Wis. 2d at 206–207, 564 N.W.2d at 721–722.

¶11 If the first step is satisfied, the second step requires the trial court to make an independent determination of whether the defendant who waives his right to a lawyer is competent to represent himself. ***Id.***, 211 Wis. 2d at 208–209,

564 N.W.2d at 722–723. "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." ***Id.***, 211 Wis. 2d at 212, 564 N.W.2d at 724. To determine self-representation competency, 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.'" ***Ibid.*** (quoted source omitted). Significantly, a person of "average ability and intelligence" should be able to represent himself "unless 'a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.'" ***Ibid.*** (quoted source omitted).

¶12 Here, it is clear that Mason's assertion that he wanted to represent himself satisfies all parts of the first step of the ***Klessig*** test—Mason was making a deliberate choice to represent himself, knew the disadvantages, and was aware of the seriousness of the charge and the potential punishment. When the trial court asked Mason these questions, Mason always answered that he did not want a lawyer, that he had experience in the courtroom and was aware of the charge and punishment.

¶13 The trial court, however, did not adequately address the factors pertinent to the second step in ***Klessig***—whether Mason was competent to represent himself. The trial court asked Mason about his education, and, as we have seen, Mason has a high school diploma and some college courses. The trial court did not ask questions about literacy, fluency in English, or about any physical or psychological disabilities. The trial court also did not determine whether Mason had average ability or intelligence. Instead, the trial court seemed

to focus on the fact that Mason did not either have a law degree or take any law-related classes.

¶14 When a trial court has not fulfilled what ***Klessig*** tells us are the required steps, we have two options: (1) discern from the Record, on our own, whether both steps were satisfied so that the defendant was either entitled or not entitled to go to trial without a lawyer; or (2) remand to the trial court for that determination. ***Id.***, 211 Wis. 2d at 213–214, 564 N.W.2d at 724. The Record does not have sufficient information for us to make a reasoned decision whether Mason was, under ***Klessig***, entitled to represent himself at the trial, given ***Klessig***'s admonition that a person of "average ability and intelligence" should be able to go to trial without a lawyer "unless 'a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.'" ***Id.***, 211 Wis. 2d at 212, 564 N.W.2d at 724 (quoted source omitted). Accordingly, we reverse and remand this matter to the trial court:

> The [trial] court should first determine whether it can make an adequate and meaningful nunc pro tunc inquiry into the question of whether [Mason] was competent to proceed pro se. If the [trial] court concludes that it can conduct such an inquiry, then it must hold an evidentiary hearing on whether [Mason] was competent to proceed pro se. If the [trial] court finds that a meaningful hearing cannot be conducted, or that [Mason] was … competent to proceed pro se, then [Mason] must be granted a new trial.

See ***id.***, 211 Wis. 2d at 213, 564 N.W.2d at 724. Among the matters the trial court should consider is, of course, what effect, if any, Mason's head injury some twenty-five years earlier might have had on Mason's ability to represent himself at the trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

Publication in the official reports is not recommended.