

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0177-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM C. HARTWIG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed and cause remanded with directions.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(f), STATS. William C. Hartwig appeals from a judgment convicting him of possession of a controlled substance, tetrahydrocannabinols (THC), contrary to §§ 161.41(3r) and 161.14(4)(t), STATS., and disorderly conduct, contrary to § 947.01, STATS. Hartwig's appeal presents the following issues: (1) whether the trial court erred when it failed to order an examination to determine whether Hartwig was competent to proceed to trial; and (2) whether Hartwig knowingly and voluntarily waived his right to counsel and was competent to proceed *pro se*. We conclude that the record does not reveal an

affirmative showing that Hartwig knowingly and voluntarily waived his right to counsel. Accordingly, we reverse the judgment and remand for a new trial.¹

BACKGROUND

On April 13, 1994, William Hartwig went to the Department of Revenue (DOR) for tax assistance. There, he met with a DOR agent who reviewed his records with him. After some disagreement about his taxes, Hartwig became agitated, loud and began to make threatening remarks. The police were called and Hartwig was arrested. A search yielded a quantity of THC in his possession and Hartwig was subsequently charged with one count of disorderly conduct and one count of possession of THC.

After the initial appearance but before trial, Hartwig's counsel, Attorney Svetlana Luebow, requested a hearing to discuss the issue of Hartwig's competency to proceed. At the hearing, Attorney Luebow stated that after having conversations with Hartwig, she doubted his ability to understand the significance and consequences of the proceedings as well as his ability to assist her with the defense. The trial court concluded that Hartwig was competent to proceed. Attorney Luebow subsequently withdrew from the case and Hartwig was permitted to proceed *pro se*. The jury convicted Hartwig of disorderly conduct and possession of THC. Hartwig appeals.

WAIVER OF RIGHT TO COUNSEL

Hartwig argues that he should not have been permitted to represent himself because he did not knowingly and voluntarily waive his right to counsel. According to Hartwig, because he requested the assistance of another attorney, the record does not show that he deliberately chose to waive the right to counsel. He also argues that the waiver was not voluntary because

¹ Because we resolve this appeal on the waiver of counsel issue, we do not reach Hartwig's other allegations of error. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (this court need not address other issues when one is dispositive of the appeal).

the trial court indicated that he did not qualify for the appointment of another attorney to represent him.

The right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. This right attaches at all critical stages of the criminal proceedings. *United States v. Wade*, 388 U.S. 218, 225-27 (1967). Before a trial court may accept a defendant's waiver of counsel, the court must satisfy itself that the waiver of this constitutional right is knowing and voluntary. *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680, 2687 (1993).

Whether a defendant has made an intelligent, knowing and voluntary waiver of his or her right to counsel is a constitutional fact which we review independently as a question of law. *State v. Woods*, 144 Wis.2d 710, 714, 424 N.W.2d 730, 731 (Ct. App. 1988). Because of its fundamental character, nonwaiver is presumed and waiver must be affirmatively shown to be knowing and voluntary. *Pickens v. State*, 96 Wis.2d 549, 555, 292 N.W.2d 601, 605 (1980). The defendant's waiver "must be scrutinized with painstaking care." *State v. Haste*, 175 Wis.2d 1, 23, 500 N.W.2d 678, 687 (Ct. App. 1993).

A defendant's right to counsel, however, must be balanced against a defendant's right to self-representation. *Pickens*, 96 Wis.2d at 556, 292 N.W.2d at 605. Thus,

in order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found.

Id. at 563-64, 292 N.W.2d at 609. Absent unusual circumstances involving a manipulative or disruptive defendant, the waiver must be clear and unequivocal. *Haste*, 175 Wis.2d at 22, 500 N.W.2d at 686.

We first examine whether the record affirmatively reflects a clear and unequivocal choice by Hartwig to waive his right to counsel. We conclude that it does not. After the trial court determined that there was no reason to doubt Hartwig's competence to proceed, Attorney Luebow requested permission to withdraw from the case. Hartwig then indicated that he would be willing to proceed *pro se* or with the assistance of another attorney. The court responded:

And I don't believe that you should be compelled to be legal counsel for the defendant in this case. On the same token the defendant has made a request to the court that he proceed *pro se*, and I don't have any reason to— to deny that request. I think he has had his opportunity for appointment of a public defender. I think that based upon, at least this court's exposure to [Attorney] Luebow's prior conduct, I think he was very competently represented. The fact that he doesn't like—they don't get along or they can't communicate with one another certainly may be a factor, but it certainly isn't grounds for the appointment of another public defender, so I am prepared to allow you to withdraw from this case, [Attorney] Luebow, and I've heard the defendant's request to proceed *pro se*, and we will.

The court did not make any findings as to whether Hartwig knowingly and voluntarily waived his right to counsel.

Four days later, at a pretrial hearing, Hartwig appeared on his own behalf and without counsel. Hartwig agreed that it was his desire and wish to represent himself. A few moments later, however, Hartwig asked the trial court if it thought he was capable of proceeding on his own. The court replied that it thought he was very capable. After a confused discussion between the court, the prosecutor and Hartwig, the prosecutor indicated that

she was concerned about Hartwig's self-representation and that the court should ensure that Hartwig was aware of its advantages and disadvantages and determine his ability to represent himself.

The trial court asked Hartwig if he understood that an attorney who was trained in the law could represent him and ask questions and present witnesses on his behalf. Hartwig replied that he understood this but noted that "when you represent yourself, you have a client for a fool." The court also asked him about his education, his mental health history and whether he suffered from any mental defect or disease. Based upon Hartwig's responses, the court stated that it was satisfied that Hartwig was knowledgeable and understood the proceedings.

The trial court then reiterated that it would provide Hartwig with the assistance of Attorney Luebow during the course of the proceedings. Hartwig replied that "if I get in a bind or something, it would be nice to have somebody there saying you can't do that." The court stated that it would provide her services if Hartwig wanted them and Hartwig indicated that he was not sure because of their differing opinions regarding plea bargains. Hartwig replied, "I think under the circumstances, I'll stay with my best attorney under the whole truth and nothing but the truth, so help us God." Hartwig then stated that he did not want Attorney Luebow's assistance but might accept the assistance of another attorney. The court then replied, "I'm satisfied that you have rejected her services, and I don't believe that you're qualified to get another attorney."

We conclude that the record does not reflect that Hartwig clearly and deliberately chose to waive his right to counsel. Instead, the record demonstrates that his wishes were equivocal at best. By questioning his own ability to proceed on his own and by twice requesting the assistance of counsel to aid him during trial, Hartwig clearly indicated that he did not feel capable of dealing with the criminal process on his own. See *Michigan v. Jackson*, 475 U.S. 625, 633 n.7 (1986).

Additionally, Hartwig's waiver was not made voluntarily because when he made a request for another attorney to assist him at trial, the trial court replied that Hartwig did not qualify for another attorney. This is erroneous. The state public defender must honor a request by a defendant for a second

attorney provided that such request is the only request made by the defendant and such change in counsel will not delay the disposition of the case or otherwise be contrary to the interests of justice. WIS. ADM. CODE § SPD 2.04(1). A defendant, however, may not make multiple requests for new counsel in an attempt to manipulate the trial court so as to obstruct the orderly procedure of the courts or to interfere with the administration of justice. *Woods*, 144 Wis.2d at 715, 424 N.W.2d at 732.² Hartwig rejected the assistance of Attorney Luebow but clearly indicated that he wanted another attorney to assist him at trial. The court rejected this request under the mistaken belief that Hartwig did not qualify for another attorney. Based upon our review of the record, we cannot say that it affirmatively demonstrates that Hartwig deliberately and unequivocally chose to waive his right to counsel.

We recognize the dilemma a trial court faces when a defendant chooses not to be represented by counsel. "Confronted with such circumstances, a trial court will be challenged to muster patience, perseverance, and decisiveness to clearly determine the specific nature of a defendant's representation." *Haste*, 175 Wis.2d at 32, 500 N.W.2d at 690. In the instant case, the record does not affirmatively show that Hartwig knowingly and voluntarily waived his right to counsel. Accordingly, we reverse the judgment and remand for a new trial.

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

This opinion will not be published. See Rule 809.23(1)(b)4, STATS.

² In *State v. Woods*, 144 Wis.2d 710, 715-16, 424 N.W.2d 730, 732 (Ct. App. 1988), we concluded that the record showed that the defendant waived his right to counsel not by his words but because his own actions showed that he intended to represent himself. In *Woods*, the defendant had rejected several attorneys leaving the court to decide whether he was waiving his right to counsel or wanted yet another attorney appointed to represent him. *Id.* at 712-14, 424 N.W.2d at 731. In that situation, we determined that when a defendant rejects several attorneys, the defendant is attempting to manipulate the trial court and will not be assigned a new attorney and instead must proceed *pro se*. *Id.* at 715, 424 N.W.2d at 732. In the instant case, Hartwig rejected one attorney and was not given the opportunity to be represented by another. Thus, we do not consider Hartwig's actions as constituting a waiver.