COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 1996

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

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No. 95-2671-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL WILLIAMS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

SCHUDSON, J. Michael Williams appeals from the judgment of conviction for two counts of first-degree sexual assault of a child, and one count of second-degree sexual assault of a child, and from the trial court order denying his motion for postconviction relief. He argues that he was denied his right of self-representation and, therefore, that the trial court erred in denying his postconviction motion to withdraw his guilty pleas. Because we conclude that Williams never invoked his right of self-representation, we affirm.

Williams was first represented by attorney Alvin R. Ugent at a "set date" of June 30, 1994, and at his preliminary hearing on July 8, 1994. At the next set date, September 16, 1994, apparently following some discussions about whether Williams wanted to change attorneys, Williams stated, "As far as representation I like to keep Mr. Ugent as my attorney. We just had a misunderstanding and we came to some kind of conclusions." Williams then agreed with the trial court's characterization of Mr. Ugent as "a very fine lawyer."

At the next appearance, October 3, 1994—the date set for trial and the date on which, ultimately, Williams pled guilty—the trial court first addressed issues regarding ***Whitty*** evidence and Williams's clothing for trial. Mr. Ugent represented Williams during the court's consideration of these matters. The issue of Williams's self-representation derives from the proceedings that immediately followed:

> MR. UGENT: O....
>
> The other problem that—um—I don't know if it's a problem, but it's a problem to me, because I have not had to work that way. But, um, Mr. Williams, you know, has been doing a lot of studying in law books, and—apparently he has access to the law library. I don't mind saying, these motions he has ruled on—he has many, many pages of matters that—you know, Supreme Court cases, and now he's indicated that, um, he would like to do some, if not a large portion of the trial himself. And—for example, to start with, he's indicated that he is going to conduct his own voir dire examination.

The trial court responded, "No, he's not. You're representing him," and explained that Williams could offer questions to counsel who would do the questioning or who could submit the questions for the court to do the questioning. Mr. Ugent then asked, "What about the rest of that—opening statement, and that sort of thing?" The trial court responded: "You're going to do that, Mr. Ugent, not him. You are not standing here as standby counsel, you are here representing him." Then the following exchange occurred:

> THE DEFENDANT: Don't I have a right to represent myself?
>
> THE COURT: We have already determined that, sir. Mr. Ugent is your lawyer, and he's going to proceed with—with your case.
>
> THE DEFENDANT: But the constitution says I have a right to—I can represent myself. That's what the constitution says.
>
> THE COURT: I know what the constitution says, sir. Mr. Ugent's representing you. You've made statements to this Court that you wanted him to represent you. The Court went through this in other proceedings. He's representing you.

Williams then spoke at length in a wandering manner using various legal terms but making no reference to self-representation. He then continued:

> I demand a court to afford me counsel of my—the VI Amendment, counsel is to be afforded, and does not have to be qualified under the United States common law and of courts of the law as stated.
>
> [THE PROSECUTOR]: ... He previously indicated—I haven't heard him state otherwise today—that he wants Mr. Ugent to continue to represent him. And if that is the ... way he chooses to proceed, then that's the way that we'll proceed ....
>
> THE COURT: Well, that's—that's a non-issue, as to the representation. The Court's already ruled on that previous—previously.
>
> You wanted Mr. Ugent to represent you, after the Court referred it back to the Public Defender's Office for another counsel, and Mr. Ugent ... has been ... advising you

and been counsel of record. So, it's a non-issue. He's representing you.

. . . .

[THE DEFENDANT]: And back to you saying that I—I asked for Mr. Ugent as my attorney, and that I—the Public Defender's Office said that I couldn't have another attorney. You told me that. The Public Defender's Office hasn't told me nothing. You said I could only have two attorneys.

THE COURT: I was telling you what the Administrative Rules were for the Public Defender's Office. I said they won't reappoint if there is more than a couple of lawyers appointed already, and your dissatisfaction with those lawyers. You don't have a right to chose [sic] your own lawyer. You do have, if you obviously want to hire somebody, but then it's at your expense.

THE DEFENDANT: Why can't I represent myself?

THE COURT: Mr. Ugent's representing you.

'Cuz, quite frankly, sir, based upon what I've heard, and based upon case law, not only statewide, but federally—um—um—my initial observation, based upon what you stated to the Court, Court doesn't believe that you're competent to represent yourself, and—and the issues that would—would—um—

THE DEFENDANT: Well—

THE COURT: —that—are probably too complicated and complex for you to—to grasp. And you're better off with an attorney representing you and your interests.

THE DEFENDANT: Well—

> THE COURT: I have a responsibility under— under— under the law to do that—
>
> THE DEFENDANT: Well—
>
> THE COURT: —make sure that you're represented.
>
> THE DEFENDANT: If Mr. Ugent isn't my attorney, why can't the United States Supreme Court supply me an attorney? I want them to look into my case.
>
> THE COURT: Well, I think you should address that to the United States Supreme Court and the Chief Justice.
>
> THE DEFENDANT: That's what I was trying to say to you.
>
> THE COURT: But for the time being, you are going to be represented by Mr. Ugent. We're going to go ahead and proceed with this trial.

Following a brief discussion of other trial matters, Mr. Ugent commented:

> See, the only—the thing that I think we wanted to point out—he's not asking—at least it was my understanding, he was not asking to change lawyers now, but he did feel that he wanted to conduct parts of the—the trial himself.

Denying Williams's postconviction motion, the trial court, in a written decision, stated, "Defendant does not have a right to hybrid representation. Based on the record, it is clear that the defendant did want an attorney." (Citation omitted.) We agree.[1]

[1] We do not mean to imply, however, that we agree with the trial court's reasoning in all respects. The trial court precipitously commented, "We have already determined that, sir," when Williams *first* raised the question about self-representation. Although the trial

"[A] defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." ***Faretta v. California***, 422 U.S. 806, 807 (1975). As we have explained, however:

> while a defendant has the right to counsel and the right to self-representation, a defendant does not have any right to make a trial court guess what the choice may be. ... Absent a clear waiver of counsel ..., courts are well advised to mandate full representation by counsel.

State v. Haste, 175 Wis.2d 1, 32, 500 N.W.2d 678, 690 (Ct. App. 1993). Moreover, as the Wisconsin Supreme Court has explained:

> So important is the right to attorney representation in a criminal proceeding that nonwaiver is presumed and waiver must be affirmatively shown to be knowing and voluntary in order for it to be valid.

Pickens v. State, 96 Wis.2d 549, 555, 292 N.W.2d 601, 605 (1980).

In this case, Williams made two comments that, in isolation, could be read as his invocation of the right of self-representation. At the very least, they should have been understood by the trial court as the kind of inquiry requiring the trial court "to muster patience, perseverance, and decisiveness to clearly determine the specific nature of [Williams's] representation." ***Haste***, 175 Wis.2d at 32, 500 N.W.2d at 690. Still, we conclude that Williams never invoked his right to self-representation. The entire proceedings of October 3, 1994, establish that: (1) Williams's first inquiry regarding self-representation immediately followed his lawyer's inquiry regarding Williams's expressed desire to conduct voir dire, and his lawyer's additional inquiry regarding Williams's possible presentation of an opening statement; (2) Williams's next reference to self-representation introduced a long statement to the trial court culminating in a request that, if Mr. Ugent was not going to represent him, the Supreme Court should provide another attorney; (3) neither Williams nor Mr.

(..continued)
court had previously addressed the issue of Williams's request to discharge his attorney, it had not specifically addressed a request regarding self-representation.

Ugent disputed the prosecutor's subsequent statement of her understanding that Williams still wanted Mr. Ugent to represent him; and (4) Mr. Ugent's last remark on the subject reiterated that Williams "wanted to conduct parts of ... the trial himself."

A defendant does not have the right to "hybrid" representation—i.e., self-representation in combination with representation by counsel. ***Moore v. State***, 83 Wis.2d 285, 297-302, 265 N.W.2d 540, 545-547, *cert. denied*, 439 U.S. 956 (1978). Thus, although the trial court failed to conduct a hearing "to clearly determine the specific nature of [Williams's] representation," ***Haste***, 175 Wis.2d at 32, 500 N.W.2d at 690, we conclude that the record establishes that Williams never invoked his right of self-representation.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.