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June 2, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1155-CR State of Wisconsin v. Justin T. Carl (L.C. #2015CF1328)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Justin T. Carl appeals from a judgment of conviction and from an order denying his postconviction motion. On appeal, Carl argues that he did not intelligently, knowingly, and voluntarily waive his right to counsel, as he did not make a deliberate choice to proceed pro se and he was not competent to represent himself; and he was denied his right to counsel. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

Carl was charged with one count of first-degree intentional homicide, two counts of possession of a firearm by a felon, and one count of theft of moveable property in the death of K.H., who was fatally shot on the street in front of Carl's home.

Carl's first trial in September 2016 was declared a mistrial when, on the fifth day of trial, defense counsel requested a competency evaluation as a result of Carl's "conduct within the courtroom and the contents of some of the notes that he has passed to the [c]ourt." After a competency evaluation, the court found Carl not competent to proceed, and he was committed for treatment. Three months later, a subsequent competency report concluded that Carl was competent, noting clinical findings of "[m]alingering." The court ordered another evaluation, which again concluded that Carl was now competent, as he did not lack "substantial mental capacity to understand the proceedings" and he was able to "assist in his defense." After a hearing, the court found Carl competent to proceed.

Carl's first request to proceed pro se came at a hearing in March 2017. There, counsel informed the court that Carl wished to retain new counsel or proceed pro se. At that time, the court conducted a lengthy ***Klessig***[2] colloquy with Carl, informing him of his constitutional rights, the seriousness of the charges against him and the elements the State would need to prove, and

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

[2] ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

the perils and disadvantages of proceeding pro se. Carl concluded that he did not want to proceed pro se and that he wanted an attorney to represent him. Carl was appointed new counsel.

Carl's second request to proceed pro se came in May 2017, when counsel sent a letter informing the court that Carl was seeking an expedited jury trial and that Carl was "willing to represent himself pro se." At a subsequent hearing, however, Carl wrote a note to counsel "saying that he [did] not wish to pursue the issue of going pro se." Counsel indicated that Carl's behavior was "rais[ing] a red flag," and the court stayed the proceedings and ordered another competency evaluation. The evaluator concluded that Carl was competent to proceed to trial. He observed that Carl "was clearly aware of his charges, their seriousness as well as the allegations against him" and that it was "notable that Mr. Carl has not received any psychotropic medications for over six months, and according to clinical records has not demonstrated any active or persistent signs of mental illness." The evaluator explained that previous records indicated that "Mr. Carl has a personality disorder with borderline and narcissistic traits," but that "[i]t is important to note that a personality disorder is not a major mental illness. It is not something that is treated with medication."

At a hearing in August 2017, counsel again informed the court that Carl wanted to proceed pro se. The court referenced its previous discussion with Carl and once more addressed his rights and the complexities of self-representation. Carl responded that he "would like to proceed pro se," and the court decided it would give him "a couple days" to consider it. At the continued hearing, the court again conducted a full and thorough ***Klessig*** colloquy with Carl and found him competent to proceed. Carl told the court that he wanted all discovery before he would decide about proceeding pro se, and the court scheduled another hearing for Carl to give

"a definitive answer about self-representation." At that subsequent hearing, Carl said he did "not wish to go pro se."

Carl's third request to proceed pro se came at the final pretrial conference in September 2017. The court again reminded Carl of their previous discussions, and Carl affirmed that he "wanted to proceed pro se." The State then requested that the court "go through the entire colloquy that the [c]ourt has done in the past with Mr. Carl so the record is clear that he was advised of his rights," and the court agreed. After the colloquy, the court found that based on the competency evaluations, "there is no major mental illness here," that "he is competent to proceed and understand the nature of the proceedings against him," and that Carl's "waiver of counsel is done on a knowing, free, and voluntary manner." Counsel agreed to serve as standby counsel. After a recess, the court began discussing motions in limine, and Carl responded, "I don't know what I'm doing and I don't know any of the procedures. I don't know why I thought—why I keep thinking that I'm going to go pro se. Why I think that." Carl asked if he could "still choose to proceed with an attorney and not go pro se," standby counsel agreed to come back on as advocate counsel, and Carl "promise[d]" he would not "bring this up again."

Carl's final request to proceed pro se came four days later, on the first day of the jury trial. After another colloquy, counsel's observation that Carl is a "bright guy" and that "he is competent to proceed pro se," and Carl's confirmation that this was his "[f]inal decision," the court granted Carl's request.

The next day Carl changed his mind. In response, the court admonished Carl for "going back and forth on an hourly basis" on whether to have an attorney and explained that "[w]hat you are doing in my estimation is deliberately trying to create error on this record." Standby

counsel indicated that he was not prepared to again become advocate counsel, that Carl "picked his own jury" and "[t]hat may not have been the jury I wanted," and that he was "not ready to give an opening statement." The court then recounted the lengthy history of the case on the record. It ultimately concluded that Carl had "forfeited his right to counsel" and that his request to have an attorney was "dilatory," "calculated to create error," and "improper and that the remedy would be a substantial delay in these proceedings."

After a six-day trial, Carl was found guilty on all counts, and the court sentenced him to life imprisonment. Postconviction, Carl filed a motion seeking a new trial on the grounds that (1) Carl should not have been allowed to proceed pro se, as he did not make a deliberate choice to do so, the court did not properly explain the difficulties and disadvantages of self-representation, the court did not adequately explain the penalties Carl was facing, and Carl was not competent to represent himself at trial; and (2) Carl was denied his right to counsel.[3] After a hearing, the postconviction court denied Carl's motion. Carl appeals.

Criminal defendants have a constitutional right to self-representation. ***State v. Klessig***, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). When a defendant requests to proceed pro se, the circuit court must ensure that he or she "(1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** at 203.

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy 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 aware of the seriousness of the charge or charges against

[3] A postconviction competency evaluation was conducted, and Carl was declared incompetent. A guardian ad litem was appointed, and with permission from the GAL, the postconviction motion was filed.

> him, and (4) was aware of the general range of penalties that could have been imposed on him.

Id. at 206. We review this question de novo, independently applying constitutional principles to the circuit court's findings of fact. ***Id.*** at 204.

We conclude the court properly granted Carl's request to proceed pro se, as it was knowing, intelligent, and voluntary. Carl argues that the circuit court's ***Klessig*** colloquy was insufficient, as the court did not adequately go over the seriousness of the crimes as well as the penalties.[4] These claims are meritless. Our independent review of the record indicates that on multiple occasions the court conducted lengthy ***Klessig*** colloquies with Carl, emphasizing among other things the seriousness of the charges and the penalties, and made appropriate findings based on the record in this case.[5]

Carl also argues that he "did not make a deliberate choice to proceed pro se," as "he was confused the entire time about whether he wanted to represent himself," and "[a] deliberate choice would be one in which Carl weighed the pros and cons of going pro se, decided whether to proceed pro se, and stuck with that choice." We disagree. The court made a credibility determination that Carl was making a deliberate choice to represent himself. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238 (circuit court's credibility determinations are entitled to highest deference on review). That choice was based on the court conducting multiple ***Klessig*** colloquies—providing Carl months of time to deliberate—with Carl

[4] Carl concedes that the court did fulfill the obligation of going over the difficulties and disadvantages of self-representation.

[5] Carl argues that the court did not explain the additional charge of theft of moveable property that was added by amended information. We disagree. The court discussed that charge with Carl both at a hearing before the amended information was filed and at the final pretrial conference.

ultimately deciding and informing the court that he wished to proceed pro se. On this record, we agree that Carl's decision to proceed pro se was deliberate.

Next, Carl argues that even if the court fulfilled its requirements under ***Klessig***, it erred because he was not competent to represent himself. To determine whether a defendant is competent to represent him or herself, "the circuit 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.'" ***Klessig***, 211 Wis. 2d at 212 (citation omitted). Courts "should not prevent persons of average ability and intelligence from representing themselves unless 'a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.'" ***Id.*** (citation omitted); *see also* ***Imani v. Pollard***, 826 F.3d 939, 946 (7th Cir. 2016) ("A state may therefore deny defendants the right to represent themselves where they suffer from 'severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'" (citation omitted)). We will uphold the circuit court's determination of a defendant's competency "unless totally unsupported by the facts apparent in the record." ***Pickens v. State***, 96 Wis. 2d 549, 569-70, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis.2d at 206; ***State v. Smith***, 2016 WI 23, ¶¶26, 29-30, 367 Wis. 2d 483, 878 N.W.2d 135.

Although Carl was found not competent in September 2016, he was subsequently found competent in December 2016, February 2017, and July 2017. The experts opined in those evaluations that Carl has a "personality disorder," and "not a major mental illness," and that while he could exhibit "distress and … unusual behavior," the behaviors were "quite transient" and "considered under the volitional control of the individual." At least one expert also surmised

that Carl was malingering. Several times on the record, the circuit court noted its finding, based on the competency reports in the case and the factors it must consider, that Carl was competent.[6] The court explained that the "issue of mental illness and competency was specifically explored on this record as it pertains to [Carl]," that "[m]ental health professionals have found that Mr. Carl is competent to proceed," and "there isn't a record of that severe mental illness at this time." *See* ***Imani***, 826 F.3d at 946. Further, as the postconviction court noted during the motion hearing, the circuit court made a record throughout the trial of its observations related to Carl's self-representation, addressing Carl's understanding of the proceedings, his ability to ask appropriate questions, and his capacity to process information and adapt. Accordingly, the record supports the circuit court's determination that Carl knowingly, voluntarily, and intelligently chose to represent himself and that he was competent to do so.

Finally, Carl argues that he was denied his right to counsel. "A defendant who acts in a voluntary and deliberate way that frustrates 'the orderly and efficient progression of the case'

[6] Carl notes in his brief-in-chief that "[i]n 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." *See* ***Klessig***, 211 Wis. 2d at 212; *but see* ***Imani v. Pollard***, 826 F.3d 939, 942, 946-47 (7th Cir. 2016) (indicating that application of a higher standard to deny a defendant's right to self-representation was contrary to federal law). This case, however, does not involve the denial of a right to self-representation, so we will address this issue no further.

forfeits his right to counsel."[7] ***State v. Suriano***, 2017 WI 42, ¶21, 374 Wis. 2d 683, 893 N.W.2d 543 (citation omitted). Whether Carl forfeited his right to counsel is a mixed question of law and fact: we review historical and evidentiary facts under a clearly erroneous standard, but the question of whether Carl's constitutional right was violated is a question of law. *See* ***id.***, ¶20. Carl argues that "he was not manipulative or disruptive" and that he had nothing "to gain by going back and forth" to delay the proceedings; instead, he claims, "he simply could not decide" whether to go pro se. Our supreme court has determined that a defendant need not have "an intent or purpose to delay" the proceedings; the question is simply whether Carl's "voluntary and deliberate choices frustrated the orderly and efficient progression of this case." *See* ***id.***, ¶¶31-32. The circuit court thoroughly recounted the case history on the record before reaching its conclusion that Carl's request to have an attorney, after requesting to proceed pro se on numerous occasions, was "dilatory," "calculated to create error," and "improper and that the remedy would be a substantial delay in these proceedings." The record on appeal supports the circuit court's conclusion, and we conclude that Carl's manipulative behavior and disruptive choices forfeited his right to counsel.

Upon the foregoing reasons,

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[7] Scenarios triggering forfeiture include: (1) a defendant's manipulative and disruptive behavior; (2) withdrawal of multiple attorneys based on a defendant's consistent refusal to cooperate with any of them and constant complaints about the attorneys' performance; (3) a defendant whose attitude is defiant and whose choices repeatedly result in delay, interfering with the process of justice; and (4) physical or verbal abuse directed at counsel or the court.

State v. Suriano, 2017 WI 42, ¶24, 374 Wis. 2d 683, 893 N.W.2d 543 (citation omitted).

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals