

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 29, 1996

NOTICE

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.

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

Nos. 95-3434
95-3435-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL P. STEFKO,

Defendant-Appellant.

APPEALS from judgments and an order of the circuit court for Walworth County: ROBERT J. KENNEDY and MICHAEL S. GIBBS, Judges.
Affirmed.

SNYDER, J. Michael P. Stefko appeals from judgments of conviction and an order denying his motions for postconviction relief.¹ Stefko

¹ Stefko pled guilty to charges of simple battery contrary to § 940.19(1), STATS., and disorderly conduct as a repeater contrary to §§ 947.01 and 939.62(1)(a), STATS. He then brought a § 974.02, STATS., motion for postconviction relief, as well as a § 974.06, STATS., motion. These were consolidated by the trial court, and a single order was issued in response to both.

argues that his conviction for disorderly conduct in an earlier case was invalid because it was obtained without the assistance of counsel and without a valid waiver of his right to counsel. He then posits that his guilty plea to disorderly conduct in the instant case was not knowingly entered because at the time he made that plea, he was not aware that the repeater charge was based, in part, on an invalid misdemeanor conviction.

We conclude that Stefko waived the right to be represented by counsel in the earlier case by his dilatory conduct and failure to retain the services of an attorney. Therefore, the second issue of whether the entry of the guilty plea in the instant case was made knowingly and voluntarily fails. Accordingly, we affirm.

On January 27, 1992, Stefko was arrested and charged with battery and disorderly conduct. He made an initial appearance on January 31 without counsel. At that appearance the trial court apprised Stefko of his right to counsel and referred him to the state public defender's office. A continued initial appearance date was set for February 5.

On February 5, Stefko again appeared without counsel. When the trial court inquired as to whether Stefko was representing himself, he responded that he had an attorney who could not make it to the appearance and that he had been instructed to plead not guilty. Although the court

attempted to ascertain the name of the attorney, Stefko was only able to provide the court with a first name. Stefko entered a not guilty plea and the case was set for pretrial on April 6. Stefko was told to provide his attorney with the pretrial date and to return to court on that date. He stated that he would notify his attorney that afternoon.²

Stefko missed a scheduled appearance on August 10, 1992, and a bench warrant was issued for his arrest. He was arrested on August 27 and made a pro se appearance. Stefko's stated excuse for missing the August 10 court date was that he thought the appearance was scheduled for August 6. Stefko was released on a signature bond and told to return to court on September 22 for a bail forfeiture hearing.

Stefko appeared without counsel at the bail forfeiture hearing. The court allowed a continuance of the signature bond and confirmed that Stefko understood he had to be present for his trial.

On November 12, 1992, Stefko appeared for the jury trial without counsel. The trial court entered into a colloquy with Stefko regarding a waiver of his right to counsel. Throughout questioning by the court, Stefko continued to make excuses for the fact that he did not have an attorney.

² The record does not include a transcript of the April 6, 1992, hearing. The State offers in its statement of facts that Stefko appeared at that hearing without counsel. Stefko does not dispute this. The State also references a hearing on June 8, 1992, and notes that Stefko appeared without counsel. While that transcript is not included in the record, Stefko again does not dispute a pro se appearance.

Stefko was specifically asked, *inter alia*, whether he elected to proceed without counsel, to which he responded, "Yes." The court then informed Stefko that the trial would not be delayed because he had neglected to arrange for counsel, and Stefko indicated that he understood this. The trial court questioned Stefko extensively as to why he had not appeared with an attorney and received numerous excuses. We conclude that the court determined that Stefko had waived his right to counsel by his conduct and proceeded to call the case.

On February 20, 1995, in the instant case, Stefko entered guilty pleas to charges of battery and disorderly conduct as a repeater. He was represented by counsel. The court conducted the appropriate colloquy to determine whether the pleas were made knowingly, intelligently and voluntarily. The State submitted the judgments of conviction showing Stefko's repeater status and he acknowledged his status as a repeater at that hearing.

Stefko was sentenced to nine months in the county jail on the battery charge and received a consecutive three-year prison sentence on the disorderly conduct charge, as a repeater, which was stayed. Stefko now appeals on grounds that the repeater enhancement was based, in part, on an invalid conviction for the 1992 charges (in which he was not represented by counsel) and because of that his guilty plea on the disorderly conduct charge was not knowingly entered.

The question of whether a defendant has waived the right to counsel requires the application of constitutional principles to the facts of the particular case. *State v. Verdone*, 195 Wis.2d 476, 480, 536 N.W.2d 172, 173 (Ct. App. 1995). We review this independently of the trial court. *Id.* While a waiver must be clear and unequivocal in order to be valid, a defendant is also required to assert the right to counsel in a timely manner, mindful of the efficient administration of justice. *See id.*

In addition, there are many instances in which a trial court may be wholly justified in requiring a defendant to proceed with trial on the day appointed and without further delay. *See id.* It is also possible for a defendant to waive the right to counsel because the defendant has deemed by his or her own actions that he or she will proceed pro se. *State v. Woods*, 144 Wis.2d 710, 715-16, 424 N.W.2d 730, 732 (Ct. App. 1988). In such a case, the deliberate choice to proceed pro se occurs by operation of law, not by virtue of the individual's express verbal consent. *Id.*

In *Woods*, the defendant argued that the trial court had not obtained a valid waiver of counsel but conceded that he had not been willing to do so. *Id.* at 714, 424 N.W.2d at 731. In the alternative, the defendant maintained that the court should have determined that he made a deliberate choice to proceed pro se, again conceding that he had not been willing to do so. *Id.* at 714, 424 N.W.2d at 731-32. The supreme court concluded that “[t]he trial court cannot be held to such unattainable requirements.” *Id.* at 714, 424 N.W.2d at 732. The court further noted that the right to counsel should not be

manipulated so as to “obstruct the orderly procedure of the courts or to interfere with the administration of justice.” *Id.* at 715, 424 N.W.2d at 732.

In the instant case, Stefko failed to retain counsel for any proceedings.³ Pretrial hearings spanned eleven months, and Stefko was forewarned that the jury trial would proceed on the next scheduled date. Despite these warnings he did not retain an attorney.

Our independent review of the record convinces us that this case is controlled by *Woods*. The trial court gave Stefko numerous continuances to allow him to appear with counsel and repeatedly advised him of his responsibility to secure representation. After eleven months and the arrival of the trial date, the court was left without options. We conclude that Stefko waived his right to counsel, both affirmatively and through his own actions. *See id.* at 715-16, 424 N.W.2d at 732.

Stefko contends that the supreme court's holding in *Keller v. State*, 75 Wis.2d 502, 249 N.W.2d 773 (1977), and our more recent holding in *Verdone* dictate a different result. He maintains that because of “the protecting duty imposed upon the trial court,” *see Keller*, 75 Wis.2d at 508, 249 N.W.2d at 776, and the fact that the record gives “no indication whatever that Mr. Stefko's appearance on the day of trial without an attorney was for purposes of delay or to interfere with the administration of justice,” *see Verdone*, 195 Wis.2d at 482,

³ While we note that the record does not include transcripts for every court appearance Stefko made over the eleven months between the filing of charges and the trial, he does not dispute the State's position that he never made an appearance with counsel.

536 N.W.2d at 174, we are now required to reverse the earlier conviction. We disagree.

In *Keller*, the defendant was represented by counsel at the preliminary hearing and arraignment. *Keller*, 75 Wis.2d at 504, 249 N.W.2d at 774. On the day of trial, the defendant appeared without counsel and informed the court that he had a new attorney, but that the attorney was deer hunting. During its colloquy with the defendant, the trial court failed to fully consider whether there was a waiver of the right to counsel and failed to consider the constitutional rights of the defendant. *Id.* at 511-12, 249 N.W.2d at 778. Because the record was devoid of “relevant inquiries into the nature and intent of [the defendant's] actions and conduct,” the supreme court was unable to determine whether the finding of waiver was valid. *Id.* at 509, 249 N.W.2d at 777.

In the more recent case of *Verdone*, the public defender's office had informed the court two weeks prior to trial that the defendant had requested counsel.⁴ *Verdone*, 195 Wis.2d at 481, 536 N.W.2d at 174. The public defender's office and the trial court then discussed the difficulty of finding an attorney for the defendant. At trial, the defendant continued to assert his right to counsel. *Id.* at 482, 536 N.W.2d at 174. In reaching our decision to remand for a new trial, we noted that the trial court made no affirmative showing that the defendant's request for counsel was untimely or asserted for purposes of delay. *Id.*

⁴ The defendant had previously waived his right to counsel. *State v. Verdone*, 195 Wis.2d 476, 481, 536 N.W.2d 172, 174 (Ct. App. 1995).

Stefko's claim is not analogous. He agreed that he had elected to proceed pro se. The court questioned him extensively regarding his attempts to secure counsel, both through the public defender's office and independently. The court noted that he had been charged eleven months prior to the trial. The court stated, "[Y]ou just have neglected to [retain an attorney] ... and this is your day in court. It's your own lookout and if you want to proceed without a lawyer, then good luck."⁵ Our review of the record convinces us that the trial court conducted appropriate and extensive questioning of Stefko concerning his pro se status and his right to counsel.

Having concluded that the 1992 misdemeanor conviction was not invalid, Stefko's claim that his guilty plea in the instant case was not knowingly and voluntarily made must also fail. At the time the plea was entered, the trial court engaged Stefko in a colloquy concerning the rights he was waiving.⁶ The court determined that Stefko had gone over the guilty plea questionnaire with his attorney. Both Stefko and his attorney acknowledged his repeater status, including the November 12, 1992, conviction.

In sum, we conclude that the trial court correctly determined that Stefko had waived his right to counsel through his conduct. The trial court's requirement that Stefko proceed pro se in the earlier case was therefore proper. Consequently, Stefko's claim that his guilty plea to the disorderly conduct

⁵ Stefko represented himself at trial and was acquitted on the battery count. He was found guilty of disorderly conduct and was subsequently fined \$150 plus costs.

⁶ Stefko was represented by counsel throughout this proceeding.

charge in the instant case was not knowingly and voluntarily made is without merit.

By the Court. – Judgments and order affirmed.

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