

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2014AP2699-CR

Cir. Ct. No. 2012CF234

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL GOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Paul Golden appeals a judgment convicting him of two counts of battery by a prisoner. He represented himself at a jury trial after the circuit court allowed his fourth attorney to withdraw and concluded Golden forfeited his right to counsel by his conduct. Golden argues the circuit court erred

by concluding he forfeited his right to counsel and, furthermore, that he was not competent to represent himself. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Golden's first attorney, Loren Hadcock, withdrew after the preliminary hearing due to his retirement. His second attorney, Erika Bahnson, represented Golden for four months, during which time she made standard discovery requests, obtained a court order to produce certain prison personnel records, and moved for a change of venue. Two days before the scheduled trial, Golden fired Bahnson, stating he did not believe she was doing a good job.

¶3 Golden's third attorney, Lauren Otto, represented Golden for less than four months, during which time she filed a suppression motion. Despite being represented by Otto, Golden filed pro se motions to dismiss, letters asserting counterclaims and defenses, and lodged complaints with the circuit court about not hearing from Otto. Golden asked the court to send him copies of briefs and transcripts "due to the evasive nature of my current attorney," and accused Otto of neglecting his case. Golden stated he needed transcripts for future research and tactical planning, accused the State of "trickery," and asked the court not to "accept any litigation" from Otto until he could ascertain the magnitude of the alleged trickery. Golden also instructed Otto not to file any future briefs. At a hearing, Golden interrupted the court several times in an attempt to get the case dismissed. Otto ultimately indicated to the court that Golden may want to proceed pro se. She filed a notice with the court requesting an extension to allow Golden to file his own reply brief on his motion to dismiss for lack of subject matter

jurisdiction should Golden choose to proceed without counsel. The court denied Golden's pro se motions.

¶4 After Otto filed a motion to suppress certain statements made by Golden while in custody, Golden sent the court a letter claiming the motion was "in a direct violation of the attorney, client trust" and called the motion "irrelevant and intentional!!!" Golden described the motion as "fallacious" and a "deception for the State." Golden said Otto should never have been appointed "while I was representing myself." Otto then filed a motion to withdraw as counsel stating Golden

has demonstrated that he is willing to lie about the nature and scope of our attorney/client interactions, has refused to accept or listen to legal advice given, and insists that I advance arguments and make statements only with his express prior approval and consent. Mr. Golden's expectations of me as counsel are unreasonable.

Otto stated, "Golden would prefer to represent himself in this matter, as he clearly believes himself to be his own best advocate."

¶5 While the motion to withdraw was pending, Golden wrote to the circuit court recounting attorney Bahnson's termination and Otto's "manipulation" and "sabotage." He asserted the right to defend himself: "The pro se motions that you will find enclosed with this letter, means that I am exercising my right to defend myself." He continued, "Lauren Otto was, and still is, an extension of Erika Bahnson's deceiving hypocrisy, soiled with deception and duplicity." The court allowed Otto to withdraw.

¶6 Golden's fourth attorney, John Bachman, represented Golden for three months. During a suppression hearing, Golden complained about Bachman and interfered with Bachman's attempt to conduct the hearing. Also during the

hearing, Golden initially waived his Fifth Amendment rights, and later reasserted them. After the hearing, Golden sent letters to the court, including his own pro se motions and request for contempt orders. Bachman moved to withdraw as counsel, asserting that Golden, against advice from counsel, continued to file pro se motions without Bachman's advice, knowledge, or consent. Bachman alleged Golden saw his attorney's role as a "mere rubber stamp for whatever legal theories [he] concoct[s]." Golden filed two more pro se motions alleging Bachman "has already declared me to be guilty, and convicted; as well as a loss for any future appeal." He further accused Bachman of trying to sabotage his defense.

¶7 Before the circuit court ruled on Bachman's motion to withdraw, Golden filed a pro se motion to disqualify the judge, alleging Bahnson, Otto, and Bachman only reluctantly filed motions because they were trying to impress the judge, and accusing Bachman of being "obviously on the side of the District Attorney's Office." Bachman summed up his problem with Golden:

Mr. Golden and I can't agree when water is wet. We would have a fight about that probably. He continues to file pro se motions against my wishes without my consultation and input. I don't even get them directly. He sends them to the clerk. He sends them to someone in Indiana who sends them out to me.

I believe I am working against him. I'm District Attorney number two. He implies I am a liar, engaged in misconduct. I don't see how I can continue to represent him.

¶8 The circuit court granted Bachman's motion to withdraw, explaining to Golden its finding that "each of your previous two attorneys moved to withdraw because they could not work with you." The court then warned Golden, "if you continue to engage in conduct that makes it impossible for any attorney to

represent you in an effective manner, you are, by that conduct, basically saying, ‘I’m not’—‘I don’t want an attorney.’” Undeterred, Golden continued at the hearing to defend his prior conduct and to criticize all of his attorneys and the court. Although he represented he had no present plans to file additional pro se motions and requested appointment of a fifth attorney, he asserted his continuing belief that his past conduct was appropriate.

¶9 The circuit court then stated:

The impression I have is I could appoint three more attorneys and three more after that.

Unless they agree with the way you want to defend the case, you will have them filing a motion to withdraw as well.

....

... I heard your testimony two months ago on February 24. I found it to be lacking credibility based on what I have heard so far in the case. I may change my mind. But, basically, your perception of what’s going on here and reality is not the same thing. I am going to find that you have forfeited your right to counsel—you have established your record—where you could not be reasonably expected to cooperate with an attorney if I appointed one or have the Public Defender appoint a new attorney to represent you, so you’re on your own.

¶10 The day before the trial, Golden indicated he did not want to attend the trial. The judge and the prosecutor expressed their opinions about what issues would be preserved for appeal if Golden refused to attend. Golden changed his mind and decided he would attend the trial. The next morning, he again changed his mind and refused to attend. He was tried in absentia and convicted of both offenses.

DISCUSSION

¶11 The circuit court's decision regarding a defendant's forfeiture of the right to counsel will be upheld unless the court erroneously exercised its discretion. *State v. McMorris*, 2007 WI App 231, ¶18, 306 Wis.2d 79, 742 N.W.2d 322. If the circuit court fails to make specific findings to support its discretionary decisions, this court may affirm the decision if it is supported by facts in the record. *State v. Walstad*, 119 Wis. 2d 483, 514-15, 351 N.W.2d 469 (1984). When a defendant engages in manipulative or disruptive behavior, the court may find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law. *State v. Cummings*, 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996). Whether a defendant was deprived of his or her constitutional right to counsel is a question of constitutional fact that this court reviews independently as a question of law. *Id.* at 748.

¶12 The trial court properly concluded Golden forfeited his right to counsel by his conduct. His nearly complete failure to cooperate with his attorneys, disruptive behavior, repeated statements that he wished to act as his own counsel, and filing of pro se motions without notice to his attorneys, much less consultation with them, support the circuit court's discretionary decision. Golden's continued defense of his unreasonable behavior, including during the hearing addressing Bachman's motion to withdraw, sufficiently establishes his purposeful disruption of the proceedings. His actions were similar to those in *Cummings*, where the supreme court upheld the forfeiture of counsel, *id.* at 752-54, and much more egregious than the conduct in *Keller v. State*, 75 Wis. 2d 502, 504-05, 249 N.W.2d 773 (1977), where the court found the record insufficient to affirm waiver of the replacement counsel.

¶13 Golden argues the circuit court failed to follow the procedures set out in the dissent in *Cummings* for deciding whether his behavior forfeited his right to counsel, particularly by failing to warn him that his behavior could result in forfeiture of his right to counsel before he committed the conduct that resulted in forfeiture. A dissent is what the law is not. *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). The majority opinion in *Cummings* stated the court “would be hard pressed not to find [forfeiture]” even without considering the circuit court’s “one more chance” warning. *Cummings*, 199 Wis. 2d at 757. That the court here did not strictly follow all of the recommended procedures recommended in the *Cummings* dissent does not constitute a basis for a reversal.

¶14 Although a defendant’s competency to proceed without an attorney must be determined when the circuit court considers whether his conduct forfeited his right to counsel, *see State v. Coleman*, 2002 WI App 100, ¶34, 253 Wis. 2d 693, 644 N.W.2d 283, the record does not support Golden’s assertion that he was not competent to represent himself. Golden focuses on the circuit court’s description of his pro se motions—that they “do not constitute a legal brief that a law student would file, let alone an experienced attorney”—and Golden’s “perception of what’s going on here and reality is not the same thing.” However, the factors that determine a defendant’s competency for self-representation are education, literacy, fluency in English, and any physical or psychological disability that may significantly affect his or her ability to communicate a possible defense to the jury. *State v. Klessig*, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997). Although the circuit court did not make explicit findings regarding those factors, its implicit findings are sufficient when facts of record support its decision. *State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993). Based on Golden’s personal appearances in court and his numerous letters and motions,

it is apparent he possessed sufficient education, literacy, fluency and lack of physical or psychological disability to meet the minimal standards required for self-representation.

¶15 Finally, Golden's decision to be tried in absentia does not establish his lack of competency for self-representation. Golden indicated he reached that decision based on a letter from a relative. His strategy is not clear. However, merely exhibiting bad judgment does not necessarily show lack of the minimal competency needed for self-representation.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

