COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP522-CR **Cir. Ct. No. 2012CF003796**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ENNIS LEE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 BRENNAN, J. Ennis Lee Brown appeals from a judgment of conviction entered after a jury convicted him of thirty-three felony counts, all

related to the sexual abuse of five of Brown's children, and from an order denying his motion for postconviction relief.[1] On appeal he argues that: (1) he was denied his constitutional right to a speedy trial; and (2) the trial court erred in allowing Brown to represent himself at trial. Because the pretrial delays in this case were primarily caused by the defense and because the trial court properly relied on two competency reports when finding that Brown was competent to represent himself, we affirm.

BACKGROUND

¶2 Brown was arrested on July 26, 2012. Thereafter, on July 31, 2012, he was charged in a nine-count criminal complaint, based upon allegations that he sexually abused and terrorized one of his children. That same day, Brown appeared in front of the court for his initial appearance.

Representation by Attorney Michael John Hicks

¶3 On August 10, 2012, Brown appeared before the court with counsel, Attorney Michael John Hicks, for his preliminary hearing. Prior to the hearing, the State filed a forty-two-count amended complaint, adding counts alleging that Brown also sexually abused and terrorized four more of his children. On August 24, 2012, the preliminary hearing continued. Following the August 24 hearing, the trial court found probable cause and bound Brown over for trial. Attorney Hicks indicated that Brown wanted to make a speedy trial demand.

[1] While this appeal was pending, Brown, *pro se*, submitted a "Sworn Statement for the Record." He cannot supplement the record in this fashion. *See* WIS. STAT. RULE 809.15(3) (2013-14). Consequently, this court has not considered this filing in its preparation of this decision. All references to the Wisconsin Statutes are to the 2013-14 version.

¶4 On September 5, 2012, Brown appeared before the trial court for arraignment. Attorney Hicks again appeared as Brown's counsel. Brown entered not guilty pleas to all forty-two counts in the information and entered a formal speedy trial demand. The information contained the same forty-two counts included in the amended complaint and had been filed the previous day.

¶5 On November 30, 2012, the trial court held a final pretrial hearing. Again, Attorney Hicks appeared on Brown's behalf. Attorney Hicks requested an adjournment of the trial due to the complexity of the case and need for more preparation time and expressed his willingness to toll the adjourned time under Brown's speedy trial demand. However, Brown informed the trial court on the record that despite the complexity of the case, which included five victims and forty-two counts, he still wished to exercise his right to a speedy trial. The trial court ordered the trial date adjourned, concluding that it was "unreasonable to expect" Attorney Hicks "to prepare in less than 90 days for a trial of this complexity." The trial court further concluded that Attorney Hicks was "being candid, honest, that were he to be forced to proceed to trial [by the December 5, 2012 trial date], he would likely be ineffective."

¶6 In response to the trial court adjourning the trial date, Brown stated: "Judge, I will die. I'm telling you I didn't do this stuff," and further asserted that he was "represented by an attorney that doesn't even come to see me." Brown also told the court that he did not "need [Attorney Hicks] anymore" and asserted that "[a]ll you people are conspiring." The trial court eventually had Brown

removed from the courtroom for being "belligerent and disruptive" and the attorneys and the court rescheduled the trial for May 6, 2013.[2]

¶7 The trial court held a status hearing on March 29, 2013.[3] Just prior to the hearing, Brown became belligerent with Attorney Hicks while they were speaking in the bullpen. Brown was placed in restraints and was escorted by over ten deputies into the courtroom. Immediately after Attorney Hicks made his appearance, Brown engaged in the following exchange with the court:

> THE DEFENDANT: He's not my attorney. He's not my attorney. He's not my attorney. He's not my attorney. He's not my attorney. He's not my attorney. He is not my attorney. I do not want that man for my attorney.
>
> THE COURT: Mr. Brown, if you stop talking --
>
> THE DEFENDANT: He is not my attorney. I do not want him for my attorney. No, this is a bunch of bullshit with no response. You know it's all lies. You know this is wrong.
>
> THE COURT: If you stop talking --
>
> THE DEFENDANT: No, you tooken everything from me. No, fuck you. Fuck all of you, you sorry sack of shit. You call yourself a regulator of law? No, you break the law. You sick son of a bitch. All of you sick motherfuckers. You break the law and then call yourself trying to pass justice on me. You motherfuckers don't even know. All you had to do is read the fucking report, you stupid son of a bitch. You sorry motherfuckers.

[2] The transcript from the November 30, 2012 pretrial hearing shows that the trial court rescheduled the trial for May 5, 2013. However, May 5, 2013 was a Sunday, and CCAP shows that the trial was actually rescheduled to begin on May 6, 2013, a Monday.

[3] The trial court later stated that it scheduled the March 29, 2013 hearing to address the rumor that Attorney Hicks's license to practice law had been temporarily suspended. We address the temporary suspension of Attorney Hicks's law license in more detail later in this opinion.

You can't hurt me. I don't give a fuck. I tried to kill myself last night. You ruined my life, and I want to die. Keep on pushing that button. You can't hurt me, boy. I already told you that. Now like I said fuck you.

THE COURT: Here's the situation. The defendant --

THE DEFENDANT: You have no authority over me. You have nothing over me. All you think is have this body for the 2000 years that you people are trying to charge me with. That's it. But as far as everything else, suck my dick, you piece of shit.

THE COURT: Apparently, Mr. Brown is a little upset.

THE DEFENDANT: Apparently my ass, you belligerent, ignorant asshole. How you fuck everybody else -- how you turn around and push court dates back and screwing people over and play these fucking games and make these fucking kids sit in the jail all this time and make them accept pleas and shit. You can tase me all you want, son.

THE COURT: Mr. Brown is actively resisting. He has about 8, actually 10 or 11 bailiffs around him. He is being wildly out of control. He's being belligerent. This started earlier this morning.

[continued profanity and belligerence from Brown]

THE COURT: Mr. Brown --

THE DEFENDANT: You laughed at me, man. Fuck you and fuck all of you. I don't give a fuck. You ruined my life, you piece of shit.

THE COURT: Mr. Brown started this incident when he started yelling and screaming and swearing at his attorney.

THE DEFENDANT: I'm going to keep on going until I'm out of this courtroom. I do not recognize your authority. You have no authority over me. …

THE COURT: The defendant started this by swearing at Mr. Hicks, and then he spit at Mr. Hicks. He's in multiple restraints. He's in a spit mask. And in my 10 years on the bench, I've never -- and I've seen it all.

> [continued swearing and belligerence from Brown]
>
> ….
>
> THE COURT: I'm allowing Mr. Hicks to withdraw. The defendant spit on or at Mr. Hicks. As I said in all my years of doing this, this defendant is more out of control than anyone I've ever seen. He's in active restraints. My court reporter took down all the yelling, swearing, belligerence, 10 or 12 deputies holding him down.
>
> The trial date is vacated. The Public Defender's Office is going to have to try to appoint a new attorney for the defendant. The defendant is actually getting his wish in having Mr. Hicks be allowed to withdraw.
>
> ….
>
> We're going to set a new date for an attorney to be appointed. The trial date is vacated. The trial date is in May. There's no way that a new attorney can be ready by that date to represent the defendant given his behavior, given his wish to have Mr. Hicks off the case, and given the fact that he's facing 42 counts, all of which are felonies.

Representation by Attorney Michael B. Plaisted

¶8 On April 15, 2013, the trial court held a status hearing. Brown appeared in court and was represented by newly-appointed counsel, Attorney Michael B. Plaisted. Attorney Plaisted reasserted Brown's speedy trial demand "as of today's date" and asked for a trial date in that period. The court noted Brown's speedy trial demand and set trial for June 24, 2013.

¶9 On May 14, 2013, prior to the June 24, 2013 trial date, the trial court held a hearing to address Attorney Plaisted's motion to withdraw as counsel. Attorney Plaisted explained to the court that Brown was insisting that Attorney Plaisted file multiple motions on his behalf that Attorney Plaisted believed were frivolous and if filed would put his "professional responsibility and reputation in jeopardy."

¶10 The trial court then attempted to engage Brown in a dialogue, explaining to Brown that Attorney Plaisted was a very competent and experienced attorney and that "no attorney … would file a frivolous motion." Brown maintained that he wanted Attorney Plaisted to represent him, stating: "[i]f he can do as I ask, then we won't have an issue."

¶11 The trial court continued to explain to Brown that Attorney Plaisted is "not going to file frivolous motions. You don't get to put that predicate that if Mr. Plaisted jumps, no matter how high and when and often as you ask him to, he stays on the case. That's not the way this works." The court then asked Brown to decide whether he wanted Attorney Plaisted to continue to represent him, understanding that "[y]ou don't get to tell Mr. Plaisted what to do," or whether he wanted new counsel, in which case, "the trial date in June is going to be off. You're looking at a trial date probably in September, maybe August, maybe October." Brown continued to talk back to the trial court, and the trial court had Brown removed from the courtroom.

¶12 The trial court then granted Attorney Plaisted's motion to withdraw, stating: "Mr. Plaisted is off the case. I'm not going to put Mr. Plaisted through this any longer. Mr. Brown can't cooperate. I'll see if he can find someone that will represent him; otherwise, he will represent himself. I'm done." The trial court did not adjourn the June 24, 2013 trial date at that time.

Representation by Attorney Nathan Opland-Dobs

¶13 On June 14, 2013, Brown appeared in court with newly-appointed counsel, Attorney Nathan Opland-Dobs. Attorney Opland-Dobs told the court that Brown wanted him to withdraw and wanted to represent himself. Brown then told the court:

> that most of the public defenders that I got are just stalling the justice as far as I can see by keeping me incarcerated, in custody for my court dates, telling me -- not even being able to tell me exactly what my charges are and what rights I have and basically what my defense.
>
> So I figured out I'd be better off if I stood on my own, which to me is the most obvious, most common, rational thing to do in this situation.

Brown also stated that he believed that his trial had been unnecessarily delayed by "the sadistic actions of the so-called attorneys, which I believe is a conspiracy all together, attorneys trying to intimidate me, threaten me, so that's just my belief." The trial court expressed concern about Brown's ability to represent himself given the complexity of the case and the fact that Brown was insisting on going to trial in ten days.

¶14 After discussing Brown's request to proceed *pro se* with both Attorney Opland-Dobs and the State, the trial court stated that it might eventually allow Brown to represent himself, but not before ordering a competency evaluation. The court stated:

> I've seen some rather erratic behavior from Mr. Brown over the course of the last few months. He has blown up or lost control in court in front of me at least once, possibly twice, but there was one incident that was wildly out of control that was relative to Mr. Hicks being on the case, and then about swearing and screaming every bit of foul language one could imagine directed, mostly at the Court, towards Mr. Hicks, Madam DA. Mr. Plaisted did not tell me anything that would violate attorney/client privilege, but he made it clear to me that there was some erratic behavior.
>
> Most importantly, I've seen erratic behavior, including Mr. Brown making comments about a conspiracy, making comments about people being out to get him, making comments about[] there being no evidence.

> Before I could realistically consider whether or not Mr. Brown could represent himself, I need to know that he's competent to, first of all, assist his own counsel and then go from there, and I have concerns in that area, significant concerns that have been borne out by Mr. Brown's actions; requesting multiple attorneys, not being able to relate to now multiple attorneys, his very erratic, at times, behavior in court, his statements as I said about conspiracy and other things. So I'm ordering a competency evaluation.

¶15 On June 28, 2013, the trial court held a hearing to discuss the results of Brown's competency evaluation. Brown appeared in court with Attorney Opland-Dobs. Prior to the hearing, the court had reviewed the competency report prepared by Dr. John Pankiewicz. While the report noted that Brown had struggled with depression since being incarcerated and had been placed on suicide watch on several occasions, it found he was competent to stand trial. Dr. Pankiewicz found that Brown was aware of the complexity of the case and the numerous allegations against him, had a general working knowledge of criminal court proceedings, and did not have a mental defect or disease that would affect his capabilities. Brown was removed from the courtroom for "mouthing off" and general belligerence. The court set a new hearing date at which to decide whether Brown could represent himself and whether Attorney Opland-Dobs would be allowed to withdraw.

¶16 On July 15, 2013, the trial court held another hearing on Brown's request to represent himself and Attorney Opland-Dobs's request to withdraw as counsel. The trial court asked to hear from Brown. Brown expressed frustration with the way the case had been proceeding and stated that he believed his constitutional rights were being violated because the court "refus[ed] to give [him]" a speedy trial. The trial court walked through the procedural history of the case, emphasizing Brown's history of noncooperation with the court and prior

counsel, and attributed any delay in the proceedings to Brown. The trial court then took everything under advisement and said it needed to see if it could find an attorney willing to act as standby counsel.

¶17 Two days later, on July 17, 2013, the trial court allowed Attorney Opland-Dobs to withdraw as counsel and permitted Brown to represent himself. The court appointed Attorney Scott Anderson as standby counsel. In doing so, the court noted that:

> [Brown has] asked more than once to be allowed to represent himself. I've advised him, and will advise him again, that I do not think it's the best idea for someone who is not an attorney, who has not had legal training and who is facing 42 felonies.[4]
>
> However, despite some concerns that I had about competency, Mr. Brown was seen by the doctor. He was found to be competent relative to assisting counsel. Mr. Brown, sometimes his arguments are on point, sometimes they are not, but he's certainly capable of arguing on his own behalf.

Self-Representation with Attorney Scott Anderson as Standby Counsel

¶18 On August 13, 2013, Brown, through Attorney Anderson, filed a motion to dismiss the amended complaint on the grounds that Brown believed his right to a speedy trial had been violated. In the motion, he alleged that he had been arrested on July 26, 2012, that he demanded a speedy trial at the close of the preliminary hearing on August 24, 2012, and that he renewed his speedy trial request at the arraignment on September 5, 2012.

[4] Brown does not argue that he did not knowingly, intelligently, and voluntarily waive his rights to counsel. *See* ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. Therefore, we do not set forth the details of the court's colloquy with the defendant in that regard in this opinion.

¶19 Brown also stated in his motion that he had previously attempted to fire Attorney Hicks for failing to represent Brown and his interests. Brown claimed that neither Attorney Hicks nor his investigator ever met with him at the Milwaukee County jail from the date of his initial appointment through the final pretrial on November 30, 2012. Brown attached jail records confirming his assertions.

¶20 Brown also claimed in his motion to dismiss that Attorney Hicks was not licensed to practice law for at least a portion of the time that he was representing Brown. Brown claimed Attorney Hicks's license had been suspended from September 27, 2012, through October 16, 2012, and again from February 12, 2013, until March 11, 2013. Brown stated that he was unaware that Attorney Hicks's license had been suspended and that he was effectively without counsel during that time period.

¶21 On August 14, 2013, the trial court held a hearing on the motion to dismiss. Brown asserted that the trial court had forced him to keep Attorney Hicks on as his attorney, against Brown's will, in violation of his Sixth and Fourteenth Amendment Rights. The court found Brown's recitation of events "farcical and absurd." However, the court also expressed extreme frustration at Attorney Hicks for his failure to visit Brown while he was incarcerated until after the pretrial, and also at the State Public Defender's Office ("SPD") for failing to inform the court that Attorney Hicks's license had been suspended several times during his representation of Brown. The court then took the motion under advisement, providing the State with an opportunity to respond in writing.

¶22 On September 13 and September 16, 2013, the trial court conducted a hearing on Brown's motion to dismiss. Attorney Anderson explained that the

thrust of Brown's argument was that Attorney Hicks did not represent Brown during the time his license was suspended. Brown believed this time should be attributed to the State in a speedy-trial calculation because two state institutions—the SPD and the Office of Lawyer Regulation ("OLR")—did not send out notices to the court, district attorney's office, or Brown to notify them of Attorney Hicks's suspensions.

¶23 Thomas Reed, regional attorney manager for the Milwaukee Trial Division of the SPD, testified and told the court his office had appointed Attorney Hicks to represent Brown in this matter. Reed further told the court that Attorney Hicks's law license had been temporarily suspended from September 27, 2012, through October 16, 2012, and then again from February 12, 2013, through March 11, 2013. The SPD was aware of the suspensions, but did not remove Attorney Hicks from Brown's case because it is the SPD's policy to investigate the reasons for a suspension before beginning the process of removing an attorney from a case. Reed testified that in many instances temporary suspensions stem from minor compliance issues that are quickly fixed.

¶24 Keith Sellen, from the OLR, also testified that Attorney Hicks's license to practice law had been suspended from September 27, 2012, through October 16, 2012, and again from February 12, 2013, through March 11, 2013. He explained that while suspended, Attorney Hicks was barred from practicing law, and was obligated to tell the court of his suspensions. At the time of Attorney Hicks's suspensions, it was not the policy of the OLR to notify anyone of an attorney's suspension.

¶25 Following the witnesses' testimony, the trial court denied Brown's motion to dismiss the complaint for a violation of his right to a speedy trial. The

court concluded that all of the delays in the case had stemmed from Brown's poor behavior and the complexity of the case. The court explicitly found that neither the district attorney's office nor the court knew of Attorney Hicks's suspensions in a timely fashion, and that the SPD's failure to inform the court of the suspensions or remove Attorney Hicks from the case was based upon the SPD's policy to first investigate temporary suspensions. Brown was removed from the courtroom during the trial court's oral ruling for "being belligerent" and "mouthing off and swearing at his standby counsel."

¶26 On September 30, 2013, the trial court conducted its final pretrial hearing. Brown told the trial court: "You are going to jail for conspiracy, for taking my constitutional rights. As of right now you are -- I'm personally charging you with conspiracy, and I am ordering this sergeant right here to arrest you for violating my constitutional rights as of November 30th." Brown continued: "And I will call the FBI and make sure that you do time for it. I will personally do it myself. So you can holler, you can yell and raise hell, whatever you want, but you have done your own rake and you are finished."

¶27 Based upon Brown's comments at the pretrial hearing, the trial court—as well as the State and Attorney Anderson—expressed concern about Brown's competency to represent himself at trial. Attorney Anderson in particular noted that, based upon his interactions with Brown, he questioned Brown's competency to proceed *pro se*. Consequently, the trial court ordered a second competency exam.

¶28 Dr. Pankiewicz filed a second competency report with the court on October 2, 2013. In it, he found that "Brown has the intellectual capacity to communicate in a coherent manner and understand the basics of court

proceedings," that Brown "has absolutely no difficulty discussing the criminal trial process and hypothetical situations," and that there were no signs that Brown suffered from a mental disease or defect. Dr. Pankiewicz did note that Brown had decided to stop taking his antidepressant medication a few weeks prior to the exam because Brown believed it made him feel worse and not better. Brown was able to coherently explain his concerns about the criminal process in his case, including the fact that he had frequently requested a speedy trial. Brown explained to Dr. Pankiewicz that "there have been occasions where he has spoke out, at the risk of contempt, because he was outraged by the situation, especially fearful that he might be railroaded into a very serious conviction." Brown told Dr. Pankiewicz that he "chose to speak up despite the consequences, by his own choice."

¶29 After considering Dr. Pankiewicz's competency reports, and discussing the matter with the State and Attorney Anderson, the court permitted Brown to proceed *pro se*.

¶30 On October 7, 2013, trial commenced. After numerous problems, including multiple outbursts by Brown and attempts by him to intimidate the victim-witnesses while they were testifying, the trial court concluded that Brown had forfeited his right to represent himself by his behavior. Attorney Anderson represented Brown for the remainder of the trial. After multiple warnings, Brown was eventually removed from the courtroom. The jury found Brown guilty on thirty-three counts, and he was sentenced to 150 years of initial confinement.

Postconviction Representation by Attorney Mark Rosen

¶31 Attorney Mark Rosen was appointed as Brown's postconviction/appellate counsel. Attorney Rosen filed a motion for postconviction relief on Brown's behalf, claiming that the trial court erred when it

found Brown competent to represent himself. Following briefing, the trial court issued a written order denying the motion. Brown appeals.

DISCUSSION

¶32 Brown, through counsel, raises two issues on appeal. First, he claims that the trial court erred in denying his motion to dismiss the amended complaint for a violation of Brown's right to a speedy trial. Second, Brown argues that the trial court erred in permitting him to represent himself at trial. We address each in turn.

I. Brown's right to a speedy trial was not violated.

¶33 Brown was arrested on July 26, 2012, and his trial began on October 7, 2013, or 438 days later. He argues that the approximately fourteen-and-a-half month delay in bringing him to trial violated his constitutional right to a speedy trial and that the trial court erred in refusing to grant his motion to dismiss on those grounds. For the reasons which follow, we disagree.

¶34 To determine whether a defendant has been denied the constitutional right to a speedy trial, we must consider four factors: the length of the delay; the reason for the delay, that is, whether the government or the defendant is more to blame for the delay; whether the defendant asserted the right to a speedy trial; and whether the delay resulted in any prejudice to the defendant. ***State v. Leighton***, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126; *see also* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The four factors are balanced on a case-by-case basis, with no single factor representing either a necessary or a sufficient condition to the finding of a deprivation of the right to a speedy trial. *See* ***Barker***, 407 U.S. at 533. "Whether a defendant has been denied the right to a speedy trial is a constitutional question that this court reviews de novo." ***Leighton***, 237 Wis. 2d

709, ¶5. However, we review the trial court's underlying findings of historical fact for an erroneous exercise of discretion. *See* ***id.***

¶35 In this case, there is no dispute that Brown repeatedly asserted his right to a speedy trial; therefore, we will evaluate: the length of the delay; the reasons for the delay; and any resulting prejudice to Brown. *See* ***id.***, ¶6.

¶36 "The length of the delay is to some extent a triggering mechanism." ***Barker***, 407 U.S. at 530. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." ***Id.*** The State and Brown agree that the fourteen-and-a-half months, or 438 days, between the filing of the complaint and trial is presumptively prejudicial. *See* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992) (as a general rule, a twelve-month delay from charging to trial may be considered presumptively prejudicial). Consequently, we must look to the reasons for the delay.

¶37 When considering the reason advanced for the delay, we must ask, "who caused the delay?" *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). "If the delay can be attributed to the actions of the defendant, he cannot be heard to claim that that period of time be considered in deciding whether he has been denied a speedy trial." ***Id.*** "If the delay can be attributed to the [S]tate, then the [S]tate must justify the delay." ***Id.*** "[T]o be a valid reason for delay[,] it must be a delay that is intrinsic to the case itself." ***Id.*** If the State cannot justify the delay, then that period must be considered in deciding whether the defendant was denied a speedy trial. ***Id.***

¶38 Here, Brown was arrested on July 26, 2012, and he made his initial appearance five days later on July 31, 2012. Because of an intervening weekend

and the need to draft a criminal complaint following a warrantless arrest, the initial appearance was held three working days after Brown's arrest. That is a reasonable time. *See* WIS. STAT. § 970.01(1) ("Any person who is arrested shall be taken within a reasonable time before a judge…"). As such, we attribute those five days "to the ordinary demands of the judicial system" and charge it to neither Brown nor the State. *See* ***Norwood***, 74 Wis. 2d at 354. That reduces the period of chargeable delay to 433 days.

¶39 The preliminary hearing was commenced on August 10, 2012, ten days after Brown's initial appearance. *See* WIS. STAT. § 970.03(2) ("The preliminary examination shall be commenced … within 10 days [after the initial appearance of the defendant] if the defendant is in custody and bail has been fixed in excess of $500."). This period of time should also be "attributed to the ordinary demands of the judicial system," *see* ***Norwood***, 74 Wis. 2d at 354, reducing the period of chargeable delay to 423 days.

¶40 The preliminary hearing then had to be adjourned, for fourteen days, until August 24, 2012, because of the unavailability of some witnesses. The unavailability of witnesses is an intrinsic reason for delay and is not counted when determining whether a speedy trial was denied. ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324. The period of chargeable delay is thereby reduced by fourteen days to 409 days.

¶41 Thereafter, Brown was arraigned on September 5, 2012, well within the thirty days allowed for filing an information and for holding an arraignment on that information. *See* WIS. STAT. §§ 971.01(2) ("The information shall be filed with the clerk within 30 days after the completion of the preliminary examination …") & 971.05(3) (the information shall be delivered to the defendant at the

arraignment). Those twelve days between the August 24, 2012 preliminary hearing and the September 5 arraignment are also "attributed to the ordinary demands of the judicial system, *see* ***Norwood***, 74 Wis. 2d at 354, and reduce the period of chargeable delay to 397 days.

¶42 At the September 5, 2012 arraignment, Brown entered a formal speedy trial demand, and trial was scheduled for December 5, 2012, which would have provided Brown with a speedy trial a little more than four months after his arrest and within ninety-one days of his request for a speedy trial. *See* WIS. STAT. § 971.10(2)(a) ("The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. …"). Ordinarily, the entire ninety-one days between the arraignment and the scheduled trial date would be attributed to the ordinary demands of the judicial system. However, Attorney Hicks was suspended from the practice of law, and therefore, unable to represent Brown, from September 27, 2012, through October 16, 2012.

¶43 Generally, "delays caused by defense counsel are properly attributed to the defendant." ***Vermont v. Brillon***, 556 U.S. 81, 94 (2009). However, an exception to that general rule exists when the delay "result[s] from a systemic 'breakdown in the public defender system.'" ***Id.*** (citation omitted). Brown claims that such a systemic breakdown occurred here when the SPD knowingly left Attorney Hicks on Brown's case even though his law license had been temporarily suspended. We disagree.

¶44 When the SPD discovered that Attorney Hicks's license to practice law had been temporarily suspended on September 27, 2012, it followed established procedure. Reed testified that when the SPD discovers that an

appointed attorney has been suspended, it investigates the suspension to determine whether the reason for the suspension is something that signals unfitness to practice or is simply some sort of noncompliance with an order or rule. The SPD then determines whether the lawyer is going to be unable to continue his representation or whether he will be able to resume his representation in a timely way. If the suspension is caused by noncompliance that can be remedied quickly, the SPD does not invoke the formal process that would be necessary to replace the attorney.

¶45 Here, the SPD determined that there was no reason to appoint a different attorney for Brown because, by October 16, 2012, Attorney Hicks remedied the compliance problem that resulted in the first temporary suspension of his law license. Attorney Hicks's license had been reinstated by the time any action could be taken.

¶46 Because the SPD followed standard procedure after Attorney Hicks's law license was temporarily suspended on September 27, 2012, there was no "systemic 'breakdown in in the public defender system'" that would necessitate attributing that time to the State. *See* ***id.*** (citation omitted). Additionally, the entire suspension was nineteen days. As we noted above, the ninety-one days between arraignment and trial would fairly be attributed to the ordinary demands of the judicial system and not attributable to the State. Attorney Hicks's nineteen-day suspension during those ninety-one days certainly does not render the whole ninety-one day delay attributable to the State. And the exception for a systemic breakdown in the SPD system does not apply to the nineteen-day suspension where the SPD followed its regular and reasonable protocol of investigation. As such, none of the ninety-one days between the September 5, 2012 arraignment and

the December 5, 2012 trial date should be counted in determining whether a speedy trial was denied, reducing the chargeable period of delay to 306 days.

¶47 At the final pretrial on November 30, 2012, the State was ready to proceed to trial on December 5, 2012, as scheduled. However, Attorney Hicks asked for a last minute continuance, stating that he was not ready to proceed because of the complexity of the case. At counsel's request, the trial was rescheduled for May 6, 2013. Ordinarily, a delay requested by defense counsel, even when objected to by the defendant, is chargeable against the defendant. *See* ***id.*** ("delays caused by defense counsel are properly attributed to the defendant"); *see also* ***State v. Wilkens***, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990) (tactical waiver by counsel binding on defendant).

¶48 However, we must deal with the second suspension of Attorney Hicks's law license from February 12, 2013, through March 11, 2013. But contrary to Brown's assertions on appeal, here too, there was no delay attributable to a "systemic 'breakdown in the public defender system.'" *See* ***Brillon***, 556 U.S at 94 (citation omitted). Again, the SPD followed its standard procedure and determined that Attorney Hicks would be able to promptly resolve his problem with OLR and resume his representation.

¶49 We note that Brown also generally argues that he was "both factually and legally, without counsel from the arraignment in September, 2012 until the end of March, 2013," due to, not only the suspension of Attorney Hicks's law license, but also due to Attorney Hicks's failure to visit Brown or provide him with discovery during that time. However, Brown provides no law to support his allegations that a defense attorney's negligence should be attributed to the State. Moreover, as we set forth above, the general rule is that "delays caused by defense

counsel are properly attributed to the defendant," *see* ***id.***, and the United States Supreme Court has expressly stated that assigned defense counsel's "'inability or unwillingness … to move the case forward' may not be attributed to the State simply because [he is] assigned counsel,'" *see* ***id.*** at 92-93 (citation omitted; ellipsis in ***Brillon***).

¶50 Consequently, none of the 152 days between the original December 5, 2012 trial date and the May 6, 2013 first adjourned trial date requested by Attorney Hicks should be counted in determining whether a speedy trial was denied. Consequently, the period of chargeable delay is reduced to 154 days.

¶51 Prior to the May 6, 2013 first adjourned trial date, at the March 29, 2013 status hearing, Brown told the court, in no uncertain terms, that he no longer wanted Attorney Hicks to represent him. The trial court allowed Attorney Hicks to withdraw and directed the SPD to appoint Brown a new attorney. Because new counsel could not be ready to try the case in three weeks, the trial court rescheduled the trial for June 24, 2013. The delay caused by the appointment of a new attorney is attributable to Brown. As such, the delay of forty-nine days between the first adjourned trial date on May 6 and the second adjourned trial date on June 24, should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 105 days.

¶52 On May 14, 2013, Attorney Plaisted filed a motion to withdraw as counsel, which the court eventually granted. Brown argues vigorously that he did not want Attorney Plaisted to be removed as his counsel, and that any delay attributable to the trial court's decision allowing Attorney Plaisted to withdraw should be held against the State. But Brown ignores the reason for Attorney Plaisted's motion to withdraw: Brown's unreasonable insistence that

Attorney Plaisted file motions he believed to be frivolous. It is well-established law that a defendant does not get to dictate what motions to file. *See* ***State v. Gordon***, 2003 WI 69, ¶29, 262 Wis. 2d 380, 663 N.W.2d 765 ("'a lawyer is not required to consult with his client on tactical moves'") (citation omitted). Thus, any indirect delay caused by Attorney Plaisted's motion to withdraw is attributable to Brown. However, Attorney Plaisted's withdrawal did not, in and of itself, necessitate any extension of the second adjourned trial date, which remained set at June 24, 2013. As such, Attorney Plaisted's withdrawal is irrelevant in assessing responsibility for delay.

¶53 At the June 14, 2013 status hearing, Brown asked to dismiss Attorney Nathan Opland-Dobs, and asked to proceed *pro se*. However, Brown's increasingly erratic behavior led the court to order a competency exam. As such, the June 24, 2013 trial date was vacated, and the case was adjourned to June 28, 2013, for a competency hearing. The four-day delay between the dismissed-June 24 trial date and the June 28 competency hearing is attributed to Brown's request to dismiss Attorney Opland-Dobs and proceed *pro se*, and his aggressive and disruptive behavior in court, which necessitated the competency exam. As such, the period of chargeable delay is reduced to 101 days.

¶54 At the June 28, 2013 competency hearing, Brown again engaged in aggressive and disruptive behavior and had to be removed from the courtroom. The case was adjourned until July 15, 2013, for another status hearing. The delay of seventeen days between the competency hearing and the status hearing, caused by Brown's disruptive behavior, is attributable to Brown, and reduces the period of chargeable delay to eighty-four days.

¶55 At the July 15, 2013 hearing, Brown again insisted on representing himself. The trial court acceded to Brown's demand at another hearing two days later. The trial was then set for October 7, 2013, when it finally commenced. The delay of eighty-four days between the July 15 hearing when Brown asked to proceed *pro se* and the date the trial started is attributable to Brown, and therefore, is not counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to zero.

¶56 In sum, the delays in this case are not attributable to the State. Rather, all of the delays are attributable to the defense, and most are attributable to Brown's poor behavior and inability to work with his assigned counsel. Under the facts of this case, the length of the delay does not constitute a delay which is prejudicial, and Brown was not denied his right to a speedy trial. *See* ***Norwood***, 74 Wis. 2d at 354. Therefore, we affirm the trial court.

II. The trial court did not err when it permitted Brown to represent himself.

¶57 Brown also argues that the trial court erred when it permitted Brown to represent himself. He contends that in doing so the trial court ignored Brown's erratic and questionable behavior in court; Brown's delusional references to "conspiracies" and "the antichrist"; Brown's demands that the bailiffs arrest the trial court judge; Brown's depression diagnosis, history of suicide attempts, and the fact that he was no longer taking his medication at the time of trial; and Attorney Anderson's concern that Brown could not understand simple legal motions. Brown believes that the totality of these facts required the trial court to conclude that Brown was incompetent to represent himself. We disagree because we conclude there is ample evidence in the record to support the trial court's determination.

¶58 Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution guarantee both a criminal defendant's right to counsel and the right to defend oneself. ***State v. Klessig***, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). The Wisconsin Supreme Court has noted "the apparent tension between these two constitutional rights," stating "'that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.'" ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted).

¶59 In order to ensure that the right to counsel is upheld, before a defendant is permitted to represent himself, "the [trial] court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** "If the [trial] court finds that both conditions are met, the court must permit the defendant to represent himself." ***Id.*** Whether a defendant was denied his constitutional right to self-representation presents a question of constitutional fact, which we review independently of the trial court. ***Id.***, ¶19. However, the trial court's determination of competence to proceed *pro se* "'will be upheld unless totally unsupported by the facts.'" ***Id.*** (citation omitted). "We review a [trial] court determination of whether a defendant is competent to proceed pro se under what is 'essentially a clearly erroneous standard of review.'" ***State v. Marquardt***, 2005 WI 157, ¶21, 286 Wis. 2d 204, 705 N.W.2d 878 (citation omitted).

¶60 Here, Brown appeals only the second part of the ***Imani*** two-step self-representation analysis—the trial court's decision that Brown was competent to proceed *pro se*. As noted, we must uphold the trial court's decision "'unless

totally unsupported by the facts.'" *See* ***Imani***, 326 Wis. 2d 179, ¶19 (citation omitted).

¶61 Brown's argument is narrowly focused on whether the record shows he was incapable of effective communication or had either an identified psychological disorder or specific problem that rendered him incompetent to proceed *pro se*. The standards by which a court should measure a defendant's competence to represent himself are well established:

> [A]lthough technical legal knowledge is not relevant, literacy and a basic understanding over and above the competence to stand trial may be required. Surely a defendant who … is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimal understanding necessary to present a defense, is not to be allowed "to go to jail under his own banner…."
>
> Factors to consider … include 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. However, … [because] persons of average ability and intelligence are entitled to represent themselves, *a timely and proper request* [*to proceed pro se*] *should be denied only where a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist*.

Marquardt, 286 Wis. 2d 204, ¶60 (first three ellipses and first and third set of brackets in ***Marquardt***; citations omitted; emphasis added).

¶62 "Whether a defendant is competent to proceed pro se is 'uniquely a question for the trial court to determine.'" ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted). "'It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense.'" ***Id.*** (citation omitted). Appellate "review is limited

to whether the [trial] court's determination is 'totally unsupported by the facts apparent in the record.'" ***Id.*** (citation omitted).

¶63 Here, there are ample facts in the record to support the trial court's conclusion that Brown was competent to represent himself: the reports filed by Dr. Pankiewicz after Brown's competency exams. Dr. Pankiewicz examined Brown twice, and both times concluded that Brown did not suffer from any mental illness or defect.

¶64 In the first report, Dr. Pankiewicz took note of Brown's depression and the fact that he had been on suicide watch while incarcerated, but found that these facts did not affect Brown's competency to stand trial. Dr. Pankiewicz noted in the report that Brown was aware of the complexity of the case, had a working knowledge of criminal court proceedings, and did not have a mental disease or defect that affected his mental capabilities.

¶65 In the second report, Dr. Pankiewicz again noted that Brown had a history of depression and that he had recently stopped taking his medication. However, Brown reported to Dr. Pankiewicz that he stopped taking the antidepressant medication because he believed the "medication was making him worse" and that the medication was the cause of his prior suicidal thoughts. Dr. Pankiewicz observed that he believed at least one of Brown's previous attempts at self-harm was "to seek attention to his complaints about treatment in the jail."

¶66 The second competency report also discussed Brown's disruptive behavior in the courtroom. According to Dr. Pankiewicz:

> Mr. Brown indicated that he would not sit idly by when his rights and freedoms are put at risk. He indicates that he

> never made any physical threats of violence toward the court. He does admit to suggesting to bailiffs that they place the judge under arrest. During examination, he explained his reasoning for the belief that the judge could be arrested, but also agreed that was not a productive or practical thing to say, aside from getting it on the record.

In sum, Dr. Pankiewicz concluded after the second competency exam:

> As before, I have no doubt that Mr. Brown has the intellectual capacity to communicate in a coherent manner and understand the basics of court proceedings. ….
>
> Mr. Brown has absolutely no difficulty discussing the criminal trial process and hypothetical situations. He expressed strong beliefs regarding how this case should proceed. He also expressed strong beliefs about his perceptions of unfair treatment by the court. *He did explain that there have been occasions where he has spoken out, at the risk of contempt, because he was outraged by the situation, especially fearful that he might be railroaded into a very serious conviction. In other words, Mr. Brown stated that he chose to speak up despite the consequences, by his own choice.*
>
> *I did not find evidence of signs of mental disease or defect during two examinations.* Clinical staff at the jail have not seen any signs of impaired thought process or content and have only documented depressive symptoms and occasional suicide gestures.
>
> Although I have concerns about Mr. Brown's expectations in the resolution of his charges as well as his lack of legal education, I did not find evidence to opine Mr. Brown incompetent to proceed. He may have made a number of bad choices, bad decisions and episodes of questionable behavior. I do not find evidence to link these problems to symptomatic mental illness. His judgment and choices do cause concerns about Mr. Brown's capacity to act as his own attorney. The record would suggest his actions might have derailed results favorable to his case. He has declined to pursue potentially exculpatory evidence. Again *I cannot link these questionable choices and behaviors to a mental disease.*
>
> I therefore believe to a reasonable degree of medical certainty Ennis Brown does not lack substantial capacity to understand court proceedings and to assist in his own defense.

> *Mr. Brown may continue to make questionable choices as well as demonstrate problematic behaviors. I do believe these are likely consequences of personal choice as opposed to products of mental illness*.

(Emphasis added.)

¶67 The competency reports provide sufficient evidence in the record to support the trial court's conclusion that Brown was competent to proceed *pro se*. *See* ***Imani***, 326 Wis. 2d 179, ¶37. The trial court properly relied on Dr. Pankiewicz's observations that Brown understood both the complexity and consequences of the case, and that Brown had the intellectual capacity to communicate in a coherent manner. Furthermore, the trial court properly relied on Dr. Pankiewicz's conclusions that Brown's outbursts in court, while demonstrating poor judgment, were not the result of a mental disease or defect, but rather a calculated choice.

¶68 In so holding, we reject Brown's assertion that the trial court erred in relying on Dr. Pankiewicz's reports because the reports only found Brown competent *to stand trial*, as opposed to competent *to represent himself at trial*. The trial court clearly did not only rely on Dr. Pankiewicz's finding that Brown was competent to proceed. Rather, the trial court also relied on Dr. Pankiewicz's findings that Brown did not lack substantial capacity to understand court proceedings, that Brown was able to communicate in a coherent manner when he chose to do so, that Brown did not suffer from any mental disease or defect, and that Brown's outbursts in court were unrelated to competence and instead related to his outrage at the charges in the case.

¶69 Certainly, Brown is correct that there is also ample evidence in the record to support a contrary conclusion. But our standard of review in this case

only permits us to overturn the trial court's competency finding if it is wholly unsupported by the record. *See* ***Imani***, 326 Wis. 2d 179, ¶37. That is not the case here. Furthermore, Brown has failed to identify a "'specific problem or disability'" that prevented him from presenting a meaningful defense. *See* ***Marquardt***, 286 Wis. 2d 204, ¶60 (citation omitted). While Brown's behavior in the courtroom was often erratic and disruptive, Brown told Dr. Pankiewicz that he *chose* to act in such a manner after considering the consequences of his actions. And Brown has failed to explain how his depression allegedly affected his competency to proceed *pro se*.

¶70 The trial court in this case was in the unenviable position of observing Brown's in-court antics and his failure to cooperate with three court-appointed attorneys. It was the trial court who was in the best position to determine whether Brown was competent "'to present at least a meaningful defense.'" *See* ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted). Because that finding is not "'totally unsupported by the facts apparent in the record,'" we affirm. *See* ***id.*** (citation omitted).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.