COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP573-CR **Cir. Ct. No. 2008CF6190**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD DALE MASON, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Richard Dale Mason, Jr., appeals from an order of the trial court denying his request to represent himself and denying his request for a new trial, and from an order denying his motion for postconviction relief.

Mason contends that the trial court erred in determining him incompetent to represent himself. We affirm.

¶2 The State charged Mason with one count of burglary of a dwelling for stealing a lawn mower and binoculars from a residential garage. Beginning at his initial appearance, Madison indicated a desire to proceed *pro se*. The trial court tried to persuade him that he should have an attorney, and one was ultimately appointed. The first appointed attorney was allowed to withdraw; the second was not. After a discussion with Mason, the trial court told the second attorney, "I am not letting you go…. [H]e hasn't given me any indication that he is capable of handling a jury trial in a serious felony." Counsel attempted three more times to withdraw, but was denied each time. A jury ultimately convicted Mason, and the trial court sentenced him to a near-maximum seven years' initial confinement and five years' extended supervision.

¶3 Mason appealed. We concluded that the trial court had not undertaken the appropriate analysis for evaluating Mason's requests to represent himself. *See* ***State v. Mason***, No. 2010AP2796-CR, unpublished slip op. at ¶13 (WI App Jan. 10, 2012). We reversed and remanded the matter with directions for the trial court to determine whether it could adequately assess, *nunc pro tunc*, Mason's requests to proceed *pro se*. *See* ***id.***, ¶14 (citing ***State v. Klessig***, 211 Wis. 2d 194, 213, 564 N.W.2d 716 (1997)).

¶4 On remand, the trial court concluded it could conduct an adequate *nunc pro tunc* evaluation of Mason's competency to proceed *pro se*. It held a hearing and determined that Mason had not been competent to represent himself. It therefore denied his request to proceed *pro se* and denied his request for a new trial. *See* ***Klessig***, 211 Wis. 2d at 213 (if defendant was competent to represent

himself, remedy for denial is a new trial). Mason moved for postconviction relief, alleging the trial court had erroneously exercised its discretion in finding him incompetent to represent himself. The trial court reaffirmed its holding and denied the postconviction motion. Mason again appeals.

¶5 "Every criminal defendant has a fundamental right to the assistance of counsel, guaranteed by both" the Wisconsin and United States Constitutions. *See* ***State v. Imani***, 2010 WI 66, ¶20, 326 Wis. 2d 179, 786 N.W.2d 40. The defendant also has a constitutional right to represent himself. *See* ***State v. Marquardt***, 2005 WI 157, ¶56, 286 Wis. 2d 204, 205 N.W.2d 878. Although these rights are inherently at odds, the right to counsel is so important that nonwaiver of that right is presumed. *See* ***Imani***, 326 Wis. 2d 179, ¶22.

¶6 "[A]s a prerequisite to a defendant's self-representation, 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.***, ¶21. In this case, the challenge is to the trial court's determination that Mason was not competent to represent himself.[1] "[T]he trial judge's determination that a defendant 'is or is not competent to represent himself will be upheld unless totally unsupported by the facts apparently in the record.'" ***State v. Garfoot***, 207 Wis. 2d 214, 224, 558 N.W.2d 626 (1997) (citation omitted). "This is essentially a 'clearly erroneous' standard of review." ***Garfoot***, 207 Wis. 2d at 224.

[1] The challenge is not to the decision being made *nunc pro tunc*; our prior decision in this matter explains why the determination is made retroactively. *See* ***State v. Mason***, No. 2010AP2796-CR, unpublished slip op. at ¶14 (WI App Jan. 10, 2012).

¶7 There is a higher standard for determining a defendant's competence to represent himself than there is for determining whether the defendant is competent to stand trial. *See* ***Imani***, 326 Wis. 2d 179, ¶36; ***Klessig***, 211 Wis. 2d at 212. In determining whether a defendant is competent to represent himself, the trial court should consider factors like "'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). "[A] 'timely and proper request' to proceed pro se should be denied only where the [trial] court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense." ***Imani***, 326 Wis. 2d 179, ¶39 (citation and emphasis omitted).

¶8 Mason contends that he was "in short, as competent as any other defendant to represent himself in these proceedings." He contends that the trial court's conclusion that he was "prone to react aggressively to stress" is not supported by the record.[2] He asserts that the question is not whether, as the trial court found, Mason "has the potential to engage in disruptive and aggressive behaviors" but "whether the threat posed by that potential is a realistic one." Mason asserts that although he suffers from delusions, they "did not affect his ability to function," and there are "no severe impairments" to his cognitive abilities.

¶9 Ultimately, though, the trial court's decision is well-supported by the record. *See* ***Garfoot***, 207 Wis. 2d at 224. At the competency hearing, the trial

[2] Mason takes particular issue with the trial court's use of the word "prone," but a psychologist who evaluated Mason for competency to proceed indicated Mason was "prone to anger and explosive outbursts."

court detailed the information it would have had available when Mason first asked to represent himself, including prior competency evaluations regarding Mason's ability to stand trial and a discharge summary from Mendota Mental Health Institute. The trial court reviewed the applicable ***Klessig*** standards and noted that education, literacy, fluency in English, and physical disability "would not disqualify [Mason] from representing himself."

¶10 The trial court then commented that the question came down to whether Mason, who suffered a brain injury in 1984 that left him in a coma for several weeks, had a psychological disability impacting his average ability or intelligence. *See* ***Klessig***, 211 Wis. 2d at 212 (person of average intelligence should be able to proceed *pro se* absent a specific problem that may prevent presentation of meaningful defense). The trial court reviewed elements of Mason's mental health history, like his delusional beliefs, his denial of rule-violating behavior at institutions despite records to the contrary, and his denial of his need for rehabilitative services.

¶11 The trial court also noted that appointed counsel had requested a new competency evaluation regarding Mason's ability to stand trial, and it reviewed some of the information from the competency evaluation. The psychologist who evaluated Mason noted that Mason had a history of selective mutism, reporting that Mason had spontaneously indicated a hope that if he continued to refuse to speak to counsel, it would lead to dismissal of the charge against him. The trial court characterized this as Mason attempting to game the system. The trial court noted that the psychologist concluded Mason had the "potential to engage in

disruptive … behaviors when he does not achieve his goals."[3] The trial court, in making its *nunc pro tunc* determination, thus understandably commented, "I can just imagine what would have happened had I allowed him to represent himself and a ruling went against him…. I think his psychological disabilities would disqualify him from representing himself."

¶12 Accordingly, we cannot conclude that the trial court's determination that Mason was incompetent to represent himself was "totally unsupported" by the record. *See* ***Imani***, 326 Wis. 2d 179, ¶38. The trial court clearly determined that Mason's inability to appropriately respond to adverse decisions made him incapable of effectively communicating a defense to a jury. That Mason disagrees with that conclusion is insufficient to warrant reversal.

By the Court.—Orders affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[3] On the first day of trial, for example, Mason had refused to change from jail clothes into street clothes. Mason had also, out of apparent frustration, directed an episode of selective mutism towards the trial court itself.