COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP837-CR **Cir. Ct. No. 2010CF344**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT E. BOYD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Vincent Boyd appeals his judgment of conviction and a circuit court order denying his motion to withdraw his no contest plea before sentencing. Boyd argues on appeal that he established fair and just reasons to withdraw his plea before sentencing and that, therefore, he is entitled to plea

withdrawal. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Boyd was charged in June 2010 with two counts of sexual assault of a child under thirteen years of age as a persistent repeater. *See* WIS. STAT. §§ 948.02(1), 939.62(2m)(b)2. (2013-14).[1] In November 2010, Boyd's first appointed attorney was permitted to withdraw for an unspecified conflict. In February 2011, Boyd's second appointed attorney withdrew, alleging that she, too, had a conflict, that Boyd had been verbally abusive with her and her staff, and that Boyd no longer wanted her to represent him. In August 2011, Boyd's third appointed attorney moved to withdraw after Boyd submitted several *pro se* filings, including a letter in which Boyd asked the court to be allowed to "act as co-counsel." The motion to withdraw asserted that Boyd was receiving legal advice from an unnamed third party and that Boyd was insisting that his attorney follow the advice.

¶3 At a hearing on the motion of the third attorney to withdraw, the prosecution indicated that the State had obtained recordings of calls made by Boyd from jail in which he talked about keeping his appointed attorneys on his case for as long as possible and then firing them at the last minute. The State argued at the hearing that Boyd was trying to delay the proceedings and manipulate the system. The circuit court agreed that Boyd was "playing the game," but nonetheless

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

granted the motion to withdraw and agreed to appoint a fourth attorney for Boyd, warning him that this would be his last appointment.

¶4 After the appointment of a fourth attorney, John Wallace, Boyd requested a continuance of the trial date, but the court denied the request. Wallace renewed the request for a continuance at a final pretrial conference on March 26, 2012, the day before trial. Wallace explained that he and Boyd had been arguing over defense strategy. The State objected. The court again denied the request for a continuance, determining it to be another "delay tactic" by Boyd.

¶5 Wallace immediately informed the court that Boyd "has now fired me as his attorney" and "does not want me to be representing him any further." Addressing Boyd directly, the court told Boyd that he could not fire Wallace but, rather, the court had to permit him to withdraw. The court then stated that it would not let Wallace "get off the case." The court engaged in an exchange with Boyd, after which the court agreed to allow Boyd to proceed *pro se* with Wallace as "standby counsel." Boyd did not object. The court then addressed the issue of Boyd's competence to proceed *pro se*, and found that Boyd was competent to represent himself. However, the court did not engage Boyd in a colloquy to ascertain the validity of Boyd's waiver of the right to counsel. *See generally* ***State v. Klessig***, 211 Wis. 2d 194, 204-07, 564 N.W.2d 716 (1997).

¶6 The next day, Wallace informed the court that Boyd wished to enter a no contest plea. The court engaged Boyd in a plea colloquy on the record, after which the court found that Boyd had entered his plea freely, voluntarily, and intelligently. After the plea hearing, Boyd filed a *pro se* motion to withdraw his plea, alleging that Wallace had "pressured him to enter a plea" and "refused to allow Boyd to handle the proceeding himself" even though Wallace was supposed

to be acting only as standby counsel. Wallace also filed a motion for plea withdrawal on behalf of Boyd, alleging that after the court denied the request for a continuance of the trial date, Boyd felt he had "no option but to accept the plea" because the defense was unprepared for trial.

¶7 The court removed Wallace as counsel and appointed a fifth attorney, who filed a new motion for plea withdrawal on Boyd's behalf. The court denied the motion after a hearing, on the basis that Boyd had failed to demonstrate a fair and just reason for plea withdrawal. Then, on the day before the scheduled sentencing hearing, Boyd's counsel filed another motion for plea withdrawal, stating as grounds the court's failure to conduct a ***Klessig*** colloquy at the pretrial conference where Wallace was allowed to withdraw and act as standby counsel. The motion also argued that the court's determination that Boyd was competent to proceed *pro se* was inadequate. The court denied the motions and proceeded to sentence Boyd to thirty years of incarceration and twenty years of extended supervision on each count, to be served consecutively.

¶8 Boyd appealed. In a summary opinion and order, this court remanded the matter to the circuit court for an evidentiary hearing on the issue of whether Boyd's waiver of the right to counsel was knowing, intelligent, and voluntary. The circuit court proceeded to hold the hearing and, at its conclusion, made factual findings and concluded that Boyd's waiver of the right to counsel was valid. Boyd now appeals following the court's decision on remand.

STANDARD OF REVIEW

¶9 We review a circuit court's decision to grant or deny a motion to withdraw a plea before sentencing under the erroneous exercise of discretion standard. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶10 Whether a defendant was denied the constitutional right to self-representation presents a question of constitutional fact, which this court determines independently. ***State v. Imani***, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40. We apply constitutional principles to the facts of the case in order to determine whether a defendant knowingly, intelligently, and voluntarily waived the right to counsel. ***Id.***

DISCUSSION

¶11 A circuit court should grant a motion for plea withdrawal prior to sentencing if it finds a fair and just reason for the request, unless withdrawal would substantially prejudice the prosecution. ***Jenkins***, 303 Wis. 2d 157, ¶28. Boyd argues on appeal that he established fair and just reasons. Specifically, he argues that, when the circuit court permitted Wallace to serve as standby counsel, it violated Boyd's right to self-representation, that Boyd's decision to waive his right to counsel was not voluntary and deliberate, that the record fails to demonstrate that he was competent to proceed *pro se*, and that the totality of the circumstances warrants plea withdrawal.

Appointment of standby counsel

¶12 Boyd argues on appeal that Boyd's right to self-representation was violated by the manner in which standby counsel was appointed and utilized. Boyd asserts that the court appointed Wallace in an "acrimonious environment" and that the court did not define Wallace's role or give Boyd any input into that role. The State counters that, to the extent the court may have been frustrated with Boyd, that frustration was brought about by Boyd's numerous delays in the proceedings over the course of nearly two years, during which he went through multiple appointed attorneys. For the reasons discussed below, we conclude that

Boyd's right to self-representation was not violated by the appointment and use of standby counsel.

¶13 A defendant has a "constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." ***Faretta v. California***, 422 U.S. 806, 807 (1975). The United States Supreme Court has concluded that the appointment of standby counsel, even over a *pro se* defendant's objection, does not violate the right to self-representation, and that "[p]articipation by counsel with a *pro se* defendant's express approval is … constitutionally unobjectionable." ***McKaskle v. Wiggins***, 465 U.S. 168, 176-77, 182 (1984). The Wisconsin Supreme Court has recognized that the "role of standby counsel can vary over a wide spectrum, ranging from a warm body sitting beside the defendant throughout trial to participation that is tantamount to that of defense counsel." ***State v. Campbell***, 2006 WI 99, ¶66, 294 Wis. 2d 100, 718 N.W.2d 649.

¶14 Here, it is significant to note that Boyd did not object to the appointment of Wallace as standby counsel. When the court told Boyd that Wallace was "still going to be sitting there" even if Boyd represented himself, Boyd replied, "That would be fine with me." Boyd asked questions about what he would and would not be permitted to do, and his questions were answered. He asked whether he would be permitted to file the motions that he had asked Wallace to prepare, and Wallace confirmed that he could assist Boyd with the motions. Boyd asked whether he, personally, would be permitted to question witnesses. The court confirmed that Boyd could question witnesses, but told him that he would be bound by the rules of evidence in terms of what testimony would be allowed.

¶15 We agree with the State that Boyd has not pointed to any applicable legal authority that would require the court to define the scope of representation of standby counsel. However, even if such a requirement existed, the record demonstrates that Boyd did ask for and receive guidance about the scope of what he would do and what Wallace would do. We are satisfied, based on the record before us, that the court did not deprive Boyd of his right to self-representation under ***Faretta***, 422 U.S. at 807, by the manner in which it appointed Wallace as standby counsel.

¶16 We turn next to Boyd's argument that the conduct of Wallace and the court at the plea hearing violated Boyd's right to represent himself. Specifically, Boyd argues that he was unrepresented during the plea negotiations that took place on the day of the hearing because he was not personally present in negotiations with the district attorney. Although Wallace was present in the negotiations, Boyd argues that Wallace was no longer his legal representative at the time.

¶17 The State points out that the record is silent as to whether Boyd was, in fact, present during negotiations between Wallace and the district attorney. The transcript of the plea hearing shows that, at the beginning of the hearing, Wallace requested a moment to confer with Boyd, and that Boyd and Wallace conferred off the record. Immediately after his off-record discussion with Boyd, Wallace asked the court for five minutes to speak with the district attorney about a resolution. Upon conclusion of that discussion, Wallace and the district attorney informed the court of the terms of the plea agreement. The court then engaged Boyd in a plea colloquy, after which it found that Boyd's no contest plea was made freely, voluntarily, and intelligently, and accepted the plea.

¶18 The circuit court reaffirmed its finding that Boyd's plea was made freely, voluntarily, and intelligently at the hearing on his plea withdrawal motion. In making that finding, the court rejected Boyd's argument that he felt pressured by Wallace into entering the plea agreement. The court stated that Boyd "would not allow any attorney to push him around or make a decision for him. He's clearly exhibited throughout these proceedings that he is the one in charge…." Implicit in the court's finding that the plea was valid is the reasonable inference that Boyd authorized Wallace to engage in plea negotiations on his behalf. Given the facts in the record and the reasonable inferences to be drawn from them, we conclude that the circuit court did not erroneously exercise its discretion in finding that Boyd's plea was knowingly, voluntarily, and intelligently entered. *See* ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992) (we will uphold the decision of the circuit court if it is supported by credible evidence or reasonable inferences that can be drawn from this evidence).

¶19 We also reject Boyd's argument that his right to represent himself was violated by the way that Wallace interacted with the court during the plea hearing. Boyd objects to the fact that Wallace explained the plea agreement to the court and gave his opinion that Boyd was entering the plea knowingly, intelligently, and voluntarily. However, we are satisfied that these actions were consistent with Wallace's role as standby counsel. "[T]he 'chief purpose' of standby counsel in most cases is to 'serve the interests of the [circuit] court.'" ***Campbell***, 294 Wis. 2d 100, ¶76 (quoted source omitted). In these interactions, Wallace was providing information that was helpful to the court, based on his experience with Boyd. Boyd has not demonstrated that Wallace's involvement as standby counsel prevented Boyd from having "actual control" over his own

defense. *See* ***McKaskle,*** 465 U.S. at 178. Thus, we conclude that Boyd's right to self-representation was not violated by the appointment or use of standby counsel.

Waiver of right to counsel

¶20 Next, Boyd argues that the State has not established that Boyd made a valid waiver of the right to counsel. Ordinarily, a circuit court establishes a valid waiver of the right to counsel by conducting an in-court colloquy to establish 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 him, and (4) was aware of the general range of penalties that could have been imposed. ***Klessig***, 211 Wis. 2d at 206.

¶21 On appeal, Boyd does not contest that he was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against him, or the general range of penalties. Rather, Boyd asserts that the pre-plea transcripts do not establish that his choice to proceed without counsel was voluntary and deliberate. He argues that the decision resulted from pressure placed upon him by Wallace's lack of preparation and the court's refusal to grant a continuance of the trial date.

¶22 The State asserts that the facts adduced at the hearing on remand and the circuit court's findings demonstrate that Boyd's decision to proceed *pro se* was a voluntary and deliberate one. We agree with the State's position. At the evidentiary hearing on remand, the prosecution elicited testimony from Boyd that, prior to entry of his plea, he had submitted multiple filings to the court under his own name while he was still represented by appointed counsel. In one of those motions, Boyd requested that the court allow him to act as "co-counsel." Boyd

testified that if he disagreed with his attorney's strategy or argument, Boyd took it upon himself to present it to the court.

¶23 At the hearing on remand, the prosecutor also reviewed the transcripts of phone calls made by Boyd from jail, in which Boyd discussed his plans to fire his attorneys only after they'd gotten him the information he wanted. Boyd said that he planned to fire his first attorney, but not "'until her investigator completes their investigation.'" Regarding his second attorney, Boyd talked about getting her to withdraw so that she would not count against his three-attorney limit. Boyd also stated that he planned to wait until the last minute before firing his second attorney. Boyd made similar statements about his third attorney, saying that he would let him get all the information and then would fire him the day before trial.

¶24 The prosecution also had Boyd read the transcript of a phone conversation Boyd had with his mother in June 2011 in which he discussed preparing his own filings and speaking for himself in court because his attorneys were making him believe that he would be better off by himself. Boyd and his mother discussed Boyd representing himself and keeping his attorney on as an advisor. When asked on direct examination by his own attorney whether Boyd had ever seriously considered representing himself prior to the final pre-trial hearing on March 26, 2012, Boyd replied, "Never. No, I did not." He stated that his decision to represent himself "was a panicky thing" and "a reflex."

¶25 At the conclusion of the hearing, the circuit court found that the State had established by clear and convincing evidence that Boyd's waiver of the right to counsel was knowingly, intelligently, and voluntarily made. The court stated that "clearly this defendant chose to represent himself, wanted to represent

himself, was going to represent himself." The court based its ruling on a finding that Boyd's testimony that he did not want to represent himself was not credible. Implied in the court's ruling is that Boyd's contention that he was not aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against him, and the range of penalties was also not credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Boyd has failed to establish that that is the case here. Therefore, we affirm the circuit court's ruling that Boyd's choice to represent himself and waive his right to counsel was knowing, intelligent, and voluntary.

Competency

¶26 Boyd further argues that the court did not adequately address the issue of whether Boyd was competent to proceed *pro se*. Our supreme court has explained that the question of a defendant's competence to proceed *pro se* "is 'uniquely a question for the [circuit] court to determine.'" ***Imani***, 326 Wis. 2d 179, ¶37 (quoted source omitted). A circuit court's competency determination must be upheld on review unless it is "'totally unsupported by the facts apparent in the record.'" ***Id.*** (quoted source omitted).

¶27 Here, the circuit court made its competency finding about Boyd "based upon [its] experiences with him." At that point, the court had received at least eight *pro se* filings from Boyd, including one in which he asked to be recognized as co-counsel. These filings addressed a number of complex issues pertinent to Boyd's case, including the admissibility of other acts evidence and

expert witness testimony. Boyd also demonstrated, in the phone calls he made from jail, that he had a deep understanding of the public defender appointment process. We are satisfied that the record supports the circuit court's finding that Boyd was competent to represent himself, and Boyd does not now make any allegation to the contrary. *See* ***State v. Gracia***, 2013 WI 15, ¶38, 345 Wis. 2d 488, 826 N.W.2d 87 (a challenge to a circuit court's decision to allow a defendant to proceed *pro se* based on the court's failure to adequately assess competency must include the allegation that the defendant was actually incompetent at the time).

Totality of the circumstances

¶28 Boyd argues that, even if none of his arguments individually establishes a fair and just reason for plea withdrawal, the totality of the circumstances requires that he be allowed to withdraw his plea. As stated above, whether to grant or deny a presentence motion for plea withdrawal is a discretionary decision. *See* ***Jenkins***, 303 Wis. 2d 157, ¶30. The circuit court has wide "latitude" in assessing what is fair and just under the circumstances. ***Id.***, ¶29. Boyd has failed to persuade us, given the totality of the circumstances, that the circuit court erroneously exercised its discretion in determining that Boyd did not demonstrate a fair and just reason for plea withdrawal.

By the Court.—Judgment and order affirmed.

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