COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0695

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES F. KARLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Order reversed and cause remanded.*

Before Dykman, P.J., Eich and Deininger, JJ.

DEININGER, J. James Karls appeals a judgment convicting him of first-degree intentional homicide, as a party to the crime. He also appeals an order denying his motion for postconviction relief. Karls raises well over a dozen issues in this appeal, but we decide only one. We conclude that Karls was wrongly deprived of his right to counsel in this, his first and only appeal as of right from his

judgment of conviction. Accordingly, we reverse the order denying postconviction relief, request the State Public Defender to appoint postconviction counsel, and extend the deadline for filing a postconviction motion or a notice of appeal in this case until August 1, 1999.[1]

BACKGROUND

In 1991, the State charged Karls with first-degree intentional homicide, as party to the crime, while armed with a dangerous weapon, in connection with the death of Randall Walsh. He was arrested in South Carolina, waived extradition, and was returned to Wisconsin to face the homicide charge. After being bound over for trial, and while released on cash bond, Karls absconded to Costa Rica. The Dane County Circuit Court issued a bench warrant, and Karls was subsequently arrested in Costa Rica. On January 4, 1994, he was returned to Wisconsin on the basis of an extradition order and certificate of delivery executed by the government of Costa Rica. A jury found Karls guilty on April 22, 1994, of first-degree intentional homicide, as party to the crime. The court sentenced him to life imprisonment with a parole eligibility date of November 30, 2029. Subsequently, however, the Governor commuted Karls's sentence to twenty-five years imprisonment, pursuant to conditions imposed by the Costa Rican government for Karls's extradition.

The State Public Defender (SPD) appointed an attorney to represent Karls on postconviction matters. Approximately one month later, the first postconviction attorney voluntarily withdrew, explaining in a letter to the SPD that

[1] The judgment convicting Karls of first-degree homicide is not affected by our ruling since we do not reach the merits of his challenges to the judgment of conviction.

he believed he lacked the expertise, time, and money to properly pursue the international extradition issues potentially involved in Karls's postconviction proceedings. The SPD then appointed a second attorney to represent Karls. Karls subsequently filed a grievance against the second postconviction attorney with the Board of Attorneys Professional Responsibility (BAPR). The second postconviction attorney then moved this court to permit him to withdraw because of the obvious conflict of interest. We granted the motion and extended the time to file a postconviction motion or notice of appeal until December 1, 1995.

The SPD, on October 23, 1995, appointed a third attorney to represent Karls. At that attorney's request, we granted several additional extensions of postconviction deadlines in order to permit the attorney to obtain documents from the Costa Rican courts, and to pursue other avenues of investigation and the development of postconviction issues. On July 26, 1996, however, the third postconviction attorney moved this court to withdraw from representing Mr. Karls "due to recent conflicts of interest that have arisen in the case." It appears that Mr. Karls had filed a grievance with BAPR regarding the third attorney's representation. In the third attorney's motion to this court, he informed us that the SPD "will only appoint successor counsel in the present case if this court permits my withdrawal and requires the appointment of new counsel." The withdrawal motion also attached copies of various correspondence that had passed between Karls, the third postconviction attorney, and the SPD.

Early in his representation, the third attorney had written to Mr. Karls concerning Karls's apparent discomfort with the attorney's lack of experience regarding federal and international extradition issues. He informed Karls that if he intended to seek other counsel he should "do so immediately." He also told Karls the following:

> I should point out that, in my opinion, it is highly unlikely that the State Public Defender (SPD) will provide you other counsel once I have commenced work on the case. As Mr. Schairer indicated in his November 3, 1995 correspondence, your options are generally limited to proceeding pro se, or with privately retained counsel…. If you request other counsel before I commence work on your case, it is possible that the SPD will comply with the request. Once I have commenced work on the case, I do not expect that the SPD will honor any request for other counsel (unless of course, a conflict arises).

In a July 23, 1996 letter to Mr. Karls, the SPD informed Karls of the following:

> [State Public Defender rules provide] a person may request that an attorney assigned to represent them be discharged and another attorney assigned with the state public defender to honor such request if it is the only such request made by the person in that case and such change in counsel will not delay the disposition of the case or otherwise be contrary to the interests of justice. In this case, you previously discharged counsel. [The third postconviction attorney] has done substantial work on the case. Apparently there is a dispute between you as to merit and how best to proceed. [The third postconviction attorney] has categorically denied your allegations concerning discussions about money.
>
> Under these circumstances where under our rules you are not entitled to appointment of counsel of your choice not on our appellate list or demonstrated to be willing to take appointments at our private bar rates, there appears to primarily be a dispute about merit or how to proceed, your claim of attorney misconduct (uncorroborated) is absolutely denied by your present counsel and you have already made a pro se filing, I do not believe that the appointment of successor counsel is justified. My position is your options would be to continue to appear pro se or to proceed with [the third postconviction attorney]. If, however, the court of appeals requires the appointment of successor counsel in ruling on [the attorney]'s motion to withdraw he stated he intends to file, then such counsel would be appointed.

On September 4, 1996, we entered an order granting the third postconviction attorney's request for leave to withdraw based on the "irreconcilable conflicts" between counsel and Karls. We also concluded that Karls "has not shown good cause for this court to order the state public defender to

appoint yet another counsel, specifically an expert in Costa Rican extradition law." In order to allow Karls to proceed pro se, or attempt to secure other counsel, we granted a "lengthy extension" of the postconviction notice/notice of appeal deadline. Thereafter, Karls made several requests to this court for the appointment of counsel, all of which were denied, in orders entered on November 15 and December 10, 1996, and on May 8 and June 6, 1997.

Meanwhile, Karls also moved the trial court to appoint counsel for him. The trial court conducted a hearing on Karls's request on January 2, 1997, following which it found that he "has waived his right to appointed counsel by his conduct, and that the ruling of the Court of Appeals declining to appoint further counsel is the rule of this case." The trial court also conducted its own review of the potential merit of Karls's Costa Rican extradition claims, and concluded that his contentions "have no merit," and therefore it declined "in its discretion, to relieve [Karls] of the order of the Court of Appeals declining to appoint counsel, or of his own waiver by conduct of his right to appoint counsel."

Subsequently, a privately retained attorney made at least one court appearance on Karls's behalf at proceedings in the trial court on the postconviction motions which Karls had filed pro se. At a status conference on February 14, 1997, the private attorney informed the trial court that he was "retained by a third party to review Mr. Karls' motion, and if I felt there was merit to assist him in his argument before this Court, so I am retained to assist Mr. Karls for purposes of postverdict motion." Later in the proceeding, when pressed on the issue of representation, the attorney stated "I am representing him for purposes of this motion." Subsequently, however, Karls wrote the trial court a letter saying that he had discharged the private attorney for financial reasons and would be proceeding pro se. There is nothing in the record, however, indicating that this final attorney

sought or received permission from this court or the trial court to withdraw from representing Mr. Karls on postconviction matters. Throughout the period that Karls was ostensibly represented by privately retained counsel, February through July of 1997, Karls continued to file pro se postconviction motions in the trial court, as well as to correspond directly with that court and this one. As noted, during this period, Karls also renewed his requests in this court and the trial court for the appointment of postconviction/appellate counsel, all of which were denied.

On February 23, 1998, the trial court entered its order denying postconviction relief on all grounds Karls had raised in his numerous postconviction filings. Karls appeals the order denying postconviction relief, as well as his underlying conviction for first-degree intentional homicide. In his pro se briefs to this court, Karls raises numerous claims of error, which we summarize for present purposes as dealing with alleged defects in the proceedings to extradite him from South Carolina and Costa Rica; insufficiency of evidence at trial to convict him of involvement in Walsh's death; the Governor's lack of authority to commute Karls's sentence without his having requested it; and ineffective assistance of trial counsel. He also claims he was denied his constitutional right to counsel in this, his first appeal of his murder conviction. We address only this last claim, as it is dispositive of the present appeal.

ANALYSIS

Whether Karls was wrongly deprived of his constitutional right to counsel is a question of constitutional fact which we review de novo. *See* ***State v.***

Cummings, 199 Wis.2d 721, 748, 546 N.W.2d 406, 416 (1996); ***State v. Woods***, 144 Wis.2d 710, 714, 424 N.W.2d 730, 731 (Ct. App. 1988). Questions of "constitutional fact" are not actually "facts" in themselves, but are questions which require the "'application of constitutional principles to the facts as found.'" *See* ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984) (citation omitted).

A person convicted in Wisconsin of committing a crime has a constitutionally guaranteed right to appeal his or her conviction to this court. *See* WIS. CONST. art. I, § 21(1); ***State v. Perry***, 136 Wis.2d 92, 98, 401 N.W.2d 748, 751 (1987). The right to appeal includes the right that "the appeal be a meaningful one." ***Id***. at 99, 401 N.W.2d at 751. An indigent defendant is constitutionally entitled to the appointment of counsel at public expense for the purpose of prosecuting his or her "one and only appeal ... as of right" from a criminal conviction. *See* ***Douglas v. California***, 372 U.S. 353, 357-58 (1963); *see also* ***State v. Mosley***, 102 Wis.2d 636, 661-62, 307 N.W.2d 200, 214-15 (1981); ***State ex rel. Flores v. State***, 183 Wis.2d 587, 604-05, 516 N.W.2d 362, 366-67 (1994).

A defendant may waive his or her right to counsel in criminal proceedings, provided that the record reflects that the waiver is knowingly, intelligently and voluntarily made, and that the defendant is competent to proceed pro se. *See* ***State v. Klessig***, 211 Wis.2d 194, 203-04, 564 N.W.2d 716, 720 (1997). The record is clear, and the State does not dispute, that Karls did not waive his right to postconviction counsel. After we permitted his third postconviction counsel to withdraw, Karls repeatedly requested both this court and the trial court to appoint counsel for him. At the hearing on his request for counsel in the trial court, Karls accurately described his then present circumstances, "I have been declined an attorney because of the withdrawal of another lawyer and

the appeals court said because I had three lawyers." He unequivocally stated his desire to be represented and told the court, "I have never waived that right to an attorney, and I never had an open court hearing to evaluate if I can do law, and I got an eighth grade education. I know I can't do law."

A defendant may also, by his or her conduct, forfeit the right to counsel, which is what the State contends occurred in this case. *See* ***Cummings***, 199 Wis.2d at 756, 546 N.W.2d at 419-20; ***Woods***, 144 Wis.2d at 715-16, 424 N.W.2d at 732. The right in dispute in this appeal, that of an indigent defendant to have counsel provided at public expense for purposes of a first appeal as of right from a criminal conviction, appears to be grounded in the Fourteenth Amendment, rather than the Sixth Amendment, which applies to "criminal prosecutions."[2] *See* ***Douglas v. California***, 372 U.S. 353, 357-58 (1963); *but see* ***McCoy v. Court of Appeals of Wisconsin***, 486 U.S. 429, 436 (1988) ("If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel …."). Nonetheless, we conclude that our determination of whether Karls forfeited his right to counsel is governed by the holdings and analyses in ***Cummings*** and ***Woods***, notwithstanding the fact that Karls's right to be represented in this appeal may have a different constitutional origin.

Thus, the question we must decide is whether, on the record before us, Karls forfeited his right to postconviction counsel "not by virtue of [his] express verbal consent to [waiver of counsel and a deliberate choice to proceed

[2] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence." The Fourteenth Amendment provides that a state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

pro se], but rather by operation of law because [he] has deemed by his own actions that the case proceed accordingly." ***Woods***, 144 Wis.2d at 715-16, 424 N.W.2d at 732. We conclude that he did not.

In ***Woods***, the defendant effectively discharged two attorneys appointed by the SPD to represent him at trial. The trial court then admonished him "that he could not pick and choose the lawyer he wanted," and that the matter would proceed with a newly appointed attorney or the defendant would have to proceed on the trial date pro se. *See* ***id***. at 713, 424 N.W.2d at 731. On the scheduled trial date, the defendant appeared without counsel, unwilling to either proceed with a public defender or to waive counsel. The court granted an adjournment and the SPD appointed a third attorney to represent the defendant, but the defendant refused to cooperate with his new counsel. After yet another adjournment of the trial, the third attorney's motion to withdraw was denied. The defendant, however, persisted in his refusal to allow the third attorney to represent him, and the matter proceeded to trial with the defendant representing himself and the third attorney acting as standby counsel. *See* ***id***. at 713-14, 424 N.W.2d at 731.

On appeal, the defendant argued that he was erroneously deprived of his right to counsel. We concluded that the "right to counsel cannot be manipulated so as to obstruct the orderly procedure of the courts or to interfere with the administration of justice." ***Id***. at 715, 424 N.W.2d at 732. Noting that the trial court had "properly forewarned" the defendant that pro se representation would be the result if he persisted in his continued dissatisfaction with appointed counsel, we concluded that the trial court had not erroneously exercised its discretion in refusing further adjournments of the trial.

The supreme court expressly approved of our holding in ***Woods*** in ***Cummings***, where it affirmed a trial court's determination that a defendant had forfeited his right to counsel under similar circumstances. *See* ***Cummings***, 199 Wis.2d at 758-59, 546 N.W.2d at 421. On the record before it, the supreme court determined "that a desire to delay the proceedings was the sole basis for [the defendant]'s continued dissatisfaction with his court-appointed counsel," ***id***. at 750, 546 N.W.2d at 417, and that the defendant's "behavior was manipulative and disruptive and this continued dissatisfaction was based solely upon a desire to delay," ***id***. at 753, 546 N.W.2d at 419. The court concluded that in situations such as that before it, "a circuit court must have the ability to find that a defendant has forfeited his right to counsel." ***Id***. at 756, 546 N.W.2d at 419-20. In a footnote, however, the court recommended "that trial courts in the future, when faced with a recalcitrant defendant," follow the four steps recommended by the dissent, for determining that a defendant has forfeited the right to counsel. *See* ***id***. at 756 n.18, 546 N.W.2d at 420. The dissent recommended that:

> The record should reflect: (1) explicit warnings that, if the defendant persists in "X" [specific conduct], the court will find that the right to counsel has been forfeited and will require the defendant to proceed to trial pro se; (2) a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) a clear ruling when the court deems the right to counsel to have been forfeited; [and] (4) factual findings to support the court's ruling.

Id. at 764, 546 N.W.2d at 423 (Geske, J. dissenting).

The State, charitably, posits that "[t]his recommended procedure was not strictly followed" in the present case. We conclude that it was not followed at all, either in this court or the trial court. The State argues that the record reflects that Karls understood the difficulties inherent in self-representation. The State would also have us conclude that the correspondence in the record between Karls,

his third appointed counsel, and the SPD, which we have described above, is a sufficient showing that Karls was aware that he might not obtain another appointed counsel if this third attorney were permitted to withdraw. We disagree. First, we conclude that a court may not abdicate to counsel or the SPD its obligation to give "explicit warnings" and to engage a defendant in colloquy, as specified by the supreme court in ***Cummings***. Moreover, we cannot see how this correspondence constitutes "a clear ruling" that a forfeiture has occurred, or factual findings to support such a ruling.

We also conclude that the present record is insufficient for us to determine, as the supreme court did of the defendant in ***Cummings,*** that the sole motivation for Karls's dissatisfaction with his second and third appointed postconviction counsel was a desire to delay the postconviction proceedings and this appeal. Karls's sentence has not been stayed. Unlike a defendant who may perceive some benefit in delaying a trial and possible sentencing on pending charges, Karls, who has been convicted and is serving his sentence, benefits little from delaying proceedings which he believes may result in a reversal of his conviction and his freedom from imprisonment. There is no indication in the record that Karls played any role in his first postconviction counsel's decision to voluntarily withdraw from representation some thirty days after his appointment.[3] The grievance Karls filed against his second postconviction counsel was apparently not totally devoid of merit, inasmuch as BAPR concluded that the

[3] The first attorney's letter to the State Public Defender (SPD) notes that an associate had recently left his office, requiring him to "devote much of [his] time to other files, not previously planned." And, as previously noted, the letter cites a lack of time, expertise and resources, not a conflict with Karls, as the motivation for the first attorney's withdrawal.

attorney "failed to timely conduct the factual investigation necessary to assess potential post-conviction issues," and it issued a "caution" to that attorney.

When Karls's third postconviction counsel moved this court to withdraw, based in large part on Karls having filed a complaint with BAPR regarding his conduct of the case, we granted the request wholly on the basis of counsel's motion and attachments to it. Our order permitting counsel to withdraw, and our concurrent denial of Karls's motion for the appointment of successor counsel, without first ensuring that the ***Cummings*** requirements were met, was error.

The trial court did conduct a hearing on Karls's request for the appointment of counsel. We conclude, however, that the January 2, 1997 proceedings in the trial court on Karls's request to that court for appointment of counsel does not cure our error. By then, our denial of successor postconviction counsel was a fact accomplished, noted and relied upon by the trial court, and neither a judicial warning regarding Karls's conduct, nor a judicial communication regarding the risks of pro se representation, had preceded it. The trial court in good faith undertook a preliminary review of the potential merit of Karls's postconviction challenge to his extradition from Costa Rica, in order to determine whether it would direct the appointment of counsel notwithstanding our refusal to do so. However, that kind of "pre-screening" for merit prior to the appointment of postconviction counsel was expressly disapproved in ***Douglas v. California***, 372 U.S. 353, 357-58 (1963); *see also* ***Mosley***, 102 Wis.2d at 661-62, 307 N.W.2d at 214 (summarizing the holding in ***Douglas*** in these terms: "the United States Supreme Court struck down a California rule of criminal appeal which authorized an appellate court of first review, acting alone without the aid of defense counsel,

to determine from the record whether counsel should be appointed to handle the appeal").

Neither do we believe that the subsequent, brief appearance by privately retained counsel negates our failure to provide Karls with postconviction counsel at public expense, given that Karls did not waive, nor had he been properly found to have forfeited, that right. There is no dispute that Karls is indigent. The SPD had provided him counsel for over two years following his conviction. Compensation for the private attorney appears to have been furnished by others on Karls's behalf, but when that compensation was no longer forthcoming, Karls's representation by this attorney terminated. It also does not appear that the private attorney rendered substantial services during his representation of Karls. The postconviction motions and briefs in support of them were exclusively submitted by Karls himself, as have been his briefs on appeal. Finally, we note that the privately retained attorney never obtained permission from either the trial court or this court to terminate his representation of Karls.

Accordingly, we reverse the order denying Karls's motions for postconviction relief and request the SPD to appoint postconviction counsel for Karls.[4] Karls and his new counsel shall have until August 1, 1999, to file a motion for postconviction relief or a notice of appeal. We believe that is sufficient time for Karls's newly appointed counsel to take appropriate actions on his behalf since it appears from the record that all necessary transcripts have been prepared, and the Costa Rican extradition documents have been obtained and translated.

[4] On August 15, 1996, the SPD provided this court a copy of its letter to Mr. Karls in which it informed him that if "the court of appeals requires the appointment of successor counsel in ruling on [third postconviction counsel]'s motion to withdraw he stated he intends to file, then such counsel would be appointed." We are now requesting that successor counsel be appointed.

Counsel will also have the benefit of the postconviction record made in the trial court, its rulings, and the briefs filed in this court discussing the various issues Karls wishes to raise.

We warn Karls that if he continues to be dissatisfied with appointed counsel and takes steps, directly or indirectly, to discharge counsel or to cause counsel to seek withdrawal from representation, such conduct may be deemed to constitute a forfeiture of his right to be provided counsel at public expense in postconviction matters. If a forfeiture occurs, Karls will be required to obtain counsel privately or represent himself in postconviction proceedings and on appeal. Generally, self-representation is not wise. An attorney, because of his or her legal training and experience, may discover law or facts in the record which provide grounds for reversal of a conviction. And, attorneys are usually better able to prioritize issues and develop persuasive legal arguments, supported by relevant authority, than are lay persons.

We further inform Karls that there are risks inherent in proceeding pro se to seek postconviction relief or appeal his conviction. If he proceeds pro se, Karls will be solely responsible for complying with the rules of appellate procedure and for timely filing briefs or motions. If he believes a postconviction motion under RULE 809.30, STATS., is necessary, he will be responsible for filing the motion, presenting evidence or argument, and arranging for the appearance of any necessary witnesses. If he pursues an appeal in this court, he will be required to draft and file the appropriate number of copies of a brief which complies with RULE 809.19, STATS., as to content, form and length. The brief must be coherent and set forth arguments supported by references to the record on appeal and to legal authority. Failure to file a brief in compliance with these requirements may result in dismissal of the appeal with prejudice.

In order to avoid the present circumstances in the future, we suggest that counsel who are appointed to represent defendants in their first, "matter of right," postconviction proceedings and appeals, promptly notify the SPD if a defendant wishes different counsel, refuses to cooperate with counsel, or a conflict of interest arises or appears likely.[5] If counsel subsequently seeks to withdraw from representation, the SPD should indicate to this court its willingness to appoint a second attorney for the defendant, and if circumstances warrant, request the court to warn and inform the defendant of the matters required under ***Cummings***. If successor counsel then encounters similar difficulties and seeks to withdraw, we will refer the matter to the circuit court for factual findings and a determination of whether the defendant has forfeited his or her right to appointed counsel.[6]

By the Court.—Order reversed and cause remanded.

Recommended for publication in the official reports.

[5] We note that the procedure for filing a no merit report under § 809.32, STATS., may be appropriate if the conflict between postconviction counsel and a defendant is purely in regard to whether "further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit." The § 809.32 procedure complies with constitutional requirements regarding a defendant's right to representation in his or her appeal as of right from a conviction. *See* ***McCoy v. Court of Appeals of Wisconsin***, 486 U.S. 429 (1988).

[6] This court does not engage in factual inquiries, but we may refer questions to the circuit court for the purpose of making factual determinations. *See* § 808.075(6), STATS. ("appellate court may remand the record to the circuit court for additional proceedings while the appeal is pending"); *see also* § 752.39, STATS.; ***State v. Knight***, 168 Wis.2d 509, 521, 484 N.W.2d 540, 545 (1992) (in writ proceedings, court of appeals may refer issues of fact to circuit court or a referee).