

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2015AP959-CR

Cir. Ct. No. 2013CM249

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACK M. SURIANO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
D. T. EHLERS, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Jack Suriano was convicted of obstructing an officer, contrary to WIS. STAT. § 946.41(1). He argues the circuit court violated his constitutional right to counsel by ruling that Suriano forfeited his right to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

appointed counsel and by declining to provide reasonable time to obtain another attorney. We reject Suriano's arguments and affirm.

BACKGROUND

¶2 After Suriano refused the Door County sanitation department access to his property, the department obtained an inspection warrant. Department employees entered Suriano's yard to obtain a soil sample, accompanied by two law enforcement officers. When the officers provided a copy of the warrant to Suriano, he asserted it lacked a judge's signature. Suriano was also upset that a backhoe was being driven on his property, and he was asking the operator to avoid certain areas. Officer Bradley Moe subsequently testified this was "verbal interference."

¶3 As the soil sample was being taken, Suriano approached the group wearing a long coat with his hands in his pockets. According to Moe, Suriano was walking "briskly toward him," so he ordered Suriano to remove his hands from his pockets. He asked several times before Suriano complied. However, Suriano placed his right hand back in his pocket, pulled out a camera, and stuck it in Moe's face. Moe grabbed Suriano's arm and Suriano tensed up and began to pull away. Moe forced Suriano to the ground and arrested him for obstructing an officer. At trial, Suriano asserted he did not rush up to Moe, but rather walked at a normal pace. He also denied getting in Moe's face.

¶4 The state public defender (SPD) appointed three attorneys to represent Suriano, all of whom withdrew prior to trial.² Attorney Grant Erickson appeared at the initial appearance on December 16, 2013. He subsequently moved to withdraw, explaining, “The grounds for this motion are that the defendant and [a]ttorney ... have differing opinions and objectives for the handling and resolution of this case.” At a January 9, 2014 motion hearing, Suriano asked Erickson why he was moving to withdraw. Erickson replied that he believed they did not have the same objective for the case. When Suriano asked Erickson what he believed Suriano’s objective was, he replied that Suriano’s objectives were to prove his innocence, to explore every legal or even nonlegal aspect of the case, and “to be an ass. You believe that you’ve been improperly charged and because of that you desire to make it difficult or frustrating for the court system to proceed.” Ultimately, Suriano agreed to the withdrawal, stating “anybody would probably be better so—,” and the court granted the motion to withdraw. Attorney Linda Schaefer was also present in the courtroom. She indicated she had been appointed by the SPD as successor counsel but had not yet met with Suriano.

¶5 At the next appearance, on February 17, 2014, Schaefer moved to withdraw, averring that “[a] significant conflict has developed between Mr. Suriano and myself with respect to the appropriate course of action going forward in this case.” At the hearing, she did not elaborate further, and Suriano did not comment. The court granted the motion to withdraw, and advised Suriano,

² The State asserts Suriano actually had four attorneys provided to him, and it repeatedly refers to three identified attorneys by numbers 2, 3, and 4. However, the State fails to identify the first attorney, and neither its record citation nor appendix citation supports its assertion. Our review of the record reveals there was an attorney who was expected to represent Suriano at the outset of the case, but, as the circuit court found, that attorney “apparently didn’t take the case because he was busy—too busy with some other matters.”

“You will now be on your third attorney appointed with the public defender’s office. I think they have a three strike rule. Talk to them about that.”

¶6 Next, attorney Raj Singh was appointed as counsel. At his first appearance, on April 7, 2014, Singh informed the court he was not getting along with Suriano and he believed Suriano’s proposed legal issues lacked merit. Suriano acknowledged he was not satisfied with Singh’s representation thus far and asked about a court-appointed attorney. The court stated it would first need to hear from the SPD that Suriano was ineligible for further SPD representation. When asked whether he wanted to remove Singh, Suriano replied, “I hesitate to go around firing people, especially because there might be consequences. It wasn’t my idea” but “his representation of me so far ... I don’t think it’s all that beneficial to me.” Ultimately, Singh agreed there was no legal basis to withdraw at that time.

¶7 On May 14, 2014, Singh moved to withdraw. Singh stated he was afraid of Suriano because of his hostility and anger. Singh also explained that Suriano had written a letter to the SPD criticizing his representation, and that Suriano wanted to micromanage him and had insulted him. Suriano responded that Singh was refusing to investigate witnesses and to litigate a motion to suppress. Singh and Suriano also disagreed about how to communicate. Singh refused to communicate via email, while Suriano explained that the postal service was unreliable in his area and he could not afford to maintain a phone. Further, Singh wanted to meet in Green Bay, but Suriano could not afford to travel there.

¶8 Suriano stated he was not firing Singh and that “he’s making it look like I’m letting him go or firing him off which is going to be different when we get

back to the public defender's office." Suriano further stated, "[T]his is his idea" to withdraw. The court granted Singh's motion to withdraw.

¶9 The State then moved the court to find Suriano had forfeited his right to public representation. Suriano replied, "Well, that would be a real prejudice against me that because the attorneys decide to withdraw should not make my life harder or difficult or have me forego representation. I need to have an attorney represent me, preferably someone who actually wants to have a defense." Suriano also stated, "I think I need to have representation before I would have to defend against his motion. I don't think it's fair for me to be in here arguing a motion that's brought with no notice whatsoever and without any representation. If anything, the motion should be tabled until I get representation."

¶10 Instead, the court asked Suriano about his education. Suriano responded that he had completed college and most of graduate school, and that he operated his own business. The court then held:

You forfeited, as far as I'm concerned, your right to have legal representation. That means, Mr. Suriano, if you want to go out and hire an attorney or you want to contact the state public defender's office and see if they will appoint another attorney for you, that is absolutely your right, sir. When I'm saying you forfeited your right to have an attorney, that doesn't mean you can't get an attorney, but I'm finding your actions have made it clear that you will not cooperate with any attorney.

....

Mr. Erickson gets appointed on your behalf. And in my 32 years of experience, I've never heard another attorney, or now as a judge for the last 14 years, an attorney in my court refer to his client as an ass, but Mr. Erickson on the record called you an ass. So clearly you couldn't work with him. Miss Schaefer, she also withdrew and now I hear about this relationship between you and Mr. Singh. And I'm not party to any of that, but clearly there is a problem with your relationship with any attorney, sir, and this is just—we had

a trial date in this case set in March when Miss Schaefer withdrew. That trial date had to get rescheduled.

We now have a trial date in this case on June 4th of 2014 and that is not coming off the calendar. You will be here, I guess, representing yourself if you don't get a new attorney between now and then, but this is a game. Yes. It's a game, Mr. Suriano, and I'm done playing it. This case is moving forward.

Suriano inquired whether the court would consider appointing counsel if the SPD denied his request for another attorney, and the court stated it would consider it.

¶11 On May 21, the SPD wrote to the court that Suriano's request for counsel had been denied. On May 23, Suriano filed a Petition for Appointment of an Attorney. On May 27, Suriano appeared pro se. The court explained it had received a call from attorney Eric Wimberger, who indicated that Suriano requested his representation. However, Wimberger was unavailable for the June 4 trial. The court denied Suriano's request for court-appointed counsel, explaining:

I made it very clear to you when we were last on the record on the 14th of May that if you were going to be seeking out your own attorney or petitioning the Court to appoint an attorney for you make sure whoever you contact is available because I'm not moving the trial date again. So that's the status.

I am denying your request for court-appointed counsel. I've already found you've forfeited your right to counsel So if you want an attorney, you are going to need to hire one yourself.

Suriano replied, "I was unaware that you wouldn't appoint somebody if I found somebody. This was the first guy that said he would do it and it took me until, like you indicate, shortly before I filed that on Friday before I could get him on board to do it." The court declined to change the trial date.

¶12 By motion filed May 29, Suriano asked the court to reconsider its denial of his request for court-appointed counsel. He explained he had secured an attorney willing to represent him, and he argued that the refusal to accommodate new representation violated his right to counsel. On June 2, the court denied the motion.

¶13 A jury trial took place two days later. Suriano appeared without counsel. The court instructed the jury: “The defendant has a constitutional right to represent himself. I have advised Mr. Suriano that the same rules apply whether a lawyer acts for him or he acts for himself. The defendant has decided to represent himself and this decision must not influence your verdict in any manner.” The jury convicted Suriano, and the court imposed ten days of jail and a \$100 fine plus costs.³ Suriano, now represented by counsel, appeals.

DISCUSSION

¶14 Suriano argues the circuit court violated his constitutional right to counsel by ruling he forfeited his right to appointed counsel and by later declining to provide reasonable time to obtain another attorney.

¶15 A criminal defendant is guaranteed the right to counsel by both article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *State v. Coleman*, 2002 WI App 100, ¶11, 253 Wis. 2d 693, 644 N.W.2d 283. The right to counsel is necessary to ensure that a

³ The court stayed the jail sentence indefinitely pending Suriano’s payment of his fine and costs within sixty days. The circuit court denied a postconviction motion to vacate a commitment for failure to pay, but Suriano indicates he does not appeal that ruling. The judgment was stayed pending appeal.

criminal defendant receives a fair trial, that all defendants stand equal before the law and ultimately that justice is served. *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

¶16 A defendant may, nonetheless, forfeit the right to counsel by his or her conduct. *Coleman*, 253 Wis. 2d. 693, ¶16. “In such a situation, a waiver of counsel and the deliberate choice to proceed *pro se* occurs, not by virtue of a defendant’s express verbal consent to such procedure, but rather by operation of law because the defendant has deemed *by his own actions* that the case proceed accordingly.” *Id.* (quoting *State v. Woods*, 144 Wis. 2d 710, 715-16, 424 N.W.2d 730 (Ct. App. 1988)) (italics in *Woods*). “These situations are unusual, ‘most often involving a manipulative or disruptive defendant’” *Id.* (quoting *State v. Cummings*, 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996) (ellipsis in *Coleman*)). An indigent defendant is entitled to competent counsel, but that does not mean counsel of his or her own choosing. *Woods*, 144 Wis. 2d at 715. The right to counsel cannot be manipulated to obstruct the orderly procedure for trial or to disrupt the administration of justice. *Coleman*, 253 Wis. 2d 693, ¶17.

¶17 “The triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated by the defendant’s repeated dissatisfaction with his or her successive attorneys.” *Id.* (sources and quotation marks omitted). “However, forfeiture cannot occur simply because the effect of the defendant’s conduct is to frustrate the orderly and efficient progression of the case. The defendant must also have the purpose of causing that effect.” *Id.*, ¶18.

¶18 Whether a defendant has been deprived of his or her constitutional right to counsel is a question of constitutional fact. *Cummings*, 199 Wis. 2d at

748. A question of constitutional fact presents a mixed question of fact and law subject to a two-part standard of review. *State v. Hajicek*, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. The circuit court’s findings of historical fact are reviewed under the clearly erroneous standard, while the application of constitutional principles is reviewed de novo. *Id.*; *Coleman*, 253 Wis. 2d 693, ¶10.

¶19 Similar to the procedures suggested for use by circuit courts in accepting a waiver of the right to counsel, our supreme court recommends that a court contemplating forfeiture make sure the defendant understands the implications of his or her actions. *Coleman*, 253 Wis. 2d 693, ¶22. Thus, a court should: (1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel has been forfeited; (2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) make a clear ruling when the court deems the right to counsel to have been forfeited; and (4) make factual findings to support the court’s ruling. *Id.*; *Cummings*, 199 Wis. 2d at 756 n.18.

¶20 Suriano’s primary argument is that the circuit court failed to sufficiently follow the recommended procedure when determining Suriano forfeited his right to counsel. This argument, however, fails at the outset because the procedure, which focuses on the defendant’s knowledge, is not mandatory.⁴ Ultimately, our concern is not whether the defendant understood the ramifications of his actions. Rather, we must review whether Suriano frustrated the orderly and efficient progression of the case, and had the purpose to do so. *See Coleman*, 253

⁴ Although not mandatory, we strongly encourage circuit courts to follow the recommended procedure.

Wis. 2d. 693, ¶¶17-21. The record sufficiently demonstrates both of these elements.

¶21 Suriano was either unable or unwilling to work with any of the three attorneys appointed to represent him. One attorney explained Suriano’s objectives were to explore every legal or even nonlegal aspect of the case and “to be an ass.” The attorney further opined Suriano desired to “make it difficult or frustrating for the court system to proceed.” Ultimately, at the time of its forfeiture determination, the circuit court implicitly concluded Suriano was intentionally disrupting the progression of the case. After observing that the trial date had already been moved back once, the court stated, “I’m finding your actions have made it clear that you will not cooperate with any attorney. ... [T]his is a game. Yes. It’s a game, Mr. Suriano, and I’m done playing it. This case is moving forward.” On this record, we conclude the circuit court properly determined Suriano forfeited his right to appointed counsel.⁵

¶22 Suriano additionally argues the circuit court “violated [his] constitutional right to counsel by ruling on forfeiture less than a week before trial and refusing [his] request for additional time to secure an attorney.” Suriano stresses that he had only five business days to hire an attorney after the court denied his petition for court-appointed counsel. This assertion ignores important facts. The court had already determined Suriano forfeited his right to appointed

⁵ When a court determines a defendant has forfeited the right to counsel, it must still determine whether the defendant is competent to proceed without an attorney. *State v. Coleman*, 2002 WI App 100, ¶¶32-36, 253 Wis. 2d 693, 644 N.W.2d 283. Suriano does not argue he lacked such competence and, further, does not reply to the State’s developed argument that he was competent. Accordingly, we deem the issue abandoned and conceded. See *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994); *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

counsel three weeks before the scheduled trial date, and informed Suriano then that the trial date would not be pushed back again. Under the circumstances, where Suriano was facing only a single misdemeanor charge on simple facts, we cannot conclude the three weeks was so insufficient as to deprive Suriano of his right to counsel of his choice.⁶

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁶ Suriano asserts the State conceded the argument that he was provided inadequate time to obtain new counsel. Suriano's argument, however, is not clearly articulated; he does not even identify what right—if any—to counsel he still held following the circuit court's initial forfeiture determination. In light of this lack of clarity, and considering that the facts do not support Suriano's argument, we deem the State's forfeiture-of-counsel argument sufficient to refute Suriano's related argument.

