COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP856-CR **Cir. Ct. No. 2010CF194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Marlon Young appeals from a judgment of conviction entered upon his no-contest plea to repeated sexual acts of the same child. Young contends that the circuit court erroneously denied (1) his request to represent himself at trial and (2) his presentence motion for plea withdrawal. We disagree and affirm.

¶2 In 2010, Young was charged with sexually assaulting a four-year-old child who tested positive for herpes and disclosed multiple incidents of sexual contact committed by the defendant. Young initially pled not guilty and trial was continuously delayed, largely as a result of his numerous conflicts with and requests for new attorneys. By the end of November 2012, Young had been represented by six attorneys, all but one of whom withdrew at Young's request or for reasons otherwise attributable to Young's conduct. At a hearing on November 28, 2012, the circuit court permitted attorney number six to withdraw so that another attorney could be appointed, but warned Young that this next attorney would be his last:

> It is getting to the point where you can't just keep on trading for [the] next attorney. If the next attorney doesn't work out and you wish to fire him, which is your right—I just need to be clear with you. You do not have to go forward with an attorney. You can go forward without one also. But I do need to give you the warning that … should you and that attorney move to withdraw and this court finds that it's for reasons not of the attorney's making but of—of your making, that this court will then find that you have forfeited the right to counsel and that you will then proceed pro se. So, I just need to make that clear with you, Mr. Young.

¶3 Attorney Robert Peterson was appointed as Young's seventh attorney and represented Young for almost nine months when, one month before trial, he moved to withdraw. At a hearing on August 23, 2013, the circuit court

permitted Peterson to withdraw and determined that by his conduct, Young had forfeited his right to counsel and would serve as his own attorney:

> The court warned you in November of 2012 that Mr. Peterson was your final attorney. Every time we get close to a trial you make allegations that your attorney is not communicating with you or that they are in [some way] committing professional misconduct or that in some way that they are against you. You are entitled to representation, but you're not entitled to serial representation. You can't just continue to go through attorney after attorney after attorney looking for the right one.

¶4 One week later, the parties were back in court on the issue of representation. The State had filed a motion requesting that the victim be permitted to testify outside of Young's presence and it became clear that disposition of the motion would be difficult with Young representing himself. The circuit court asked Young if he wanted another appointed attorney and indicated it would be willing to appoint standby counsel. Young asked for further explanation and the circuit court explained that standby counsel was "not co-counsel," but would be "simply standing by to answer how to do things." Young asked if he could just get "another attorney" and the court expressed reluctance to again appoint advocate counsel, citing the sheer number of prior attorneys and Young's purportedly threatening behavior toward Peterson. In protest, Young attempted to explain his behavior toward Peterson and the circuit court agreed to appoint "actual counsel" for Young. Attorney Douglas Henderson was appointed as Young's eighth attorney but soon informed the court that he had a conflict of interest. The circuit court appointed Attorney Christopher Glinski as Young's ninth attorney.

¶5 Trial began on May 12, 2014, and Young appeared with Glinski. Before jury selection, Young informed the court that he wanted to enter into a plea

agreement. The court began a plea colloquy but when asked if anyone had threatened or coerced him to enter his plea, Young stated that he "was threatened and promised." The court asked for specifics and Young replied, "I plead the Fifth." The court determined it could not accept the plea and the proceedings continued, with the circuit court addressing motions in limine.

¶6 Just before the prospective jurors were brought in, Glinski made a statement suggesting that Young now wanted to represent himself. The circuit court asked for clarification, observing that Young had never before asked to represent himself. The following discussion ensued:

> THE COURT: [to trial counsel] Is he—are you telling me at this point Mr. Young is asserting his request to represent himself?
>
> [TRIAL COUNSEL]: He's requesting—well, maybe the court should have a colloquy with him in terms of what exactly he's requesting and the court should outline in terms of, you know, what—what his request would entail and, you know, what's going to happen from here out if he—if the court grants his motion.
>
> THE COURT: Okay. Mr. Young, are you requesting to represent yourself?
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> THE DEFENDANT: Well, your Honor, you said to me, you said that I can have co-counsel. You said—and my understanding is you said that I didn't know the law so I needed somebody to word it for me, tell me how to word stuff. So yeah, I was asking—I was asking him about it is it possible.
>
> THE COURT: Okay. Are you asking for it right now?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Okay. Have you ever brought this subject back up to Mr. Glinski?
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> THE DEFENDANT: When?
>
> THE COURT: Have you ever told Mr. Glinski previously that you wished to represent yourself at trial?

> THE DEFENDANT: I mean, we had—we have talked about it a couple times. I mean—
>
> THE COURT: Okay. But you never said to him yes, I'd like to represent myself?
>
> THE DEFENDANT: No.

¶7 The circuit court called a recess to review transcripts of prior proceedings. Back on the record, the court informed the parties that it had "never received any request from Mr. Young to act as his own attorney." The court denied Young's request, citing the defendant's pattern of delaying the case: "Based on the history of this file I find it to be just another stalling technique and delay in this matter; and therefore, I will deny Mr. Young's request to serve as his own attorney. This matter has been ongoing now for well over four years." Voir dire proceeded and after a jury was selected, the case was adjourned for the day.

¶8 The next day, the Sexual Assault Nurse Examiner testified about the exam performed on the victim, S.C., and S.C.'s first interview was played for the jury. Before the jury heard S.C.'s second interview, Young informed the court he wanted to change his plea to no contest.

¶9 During a lengthy plea colloquy, the court ascertained that Young had not taken any medications in the last twenty-four hours and that he believed he was thinking clearly. The circuit court accepted Young's plea after determining it was entered "freely, voluntarily, knowingly, and intelligently, with the advice of competent counsel."

¶10 Prior to sentencing, Young filed a motion seeking to withdraw his plea, alleging that he had been in pain when he entered his plea, and "[t]hat when the court asked me the questions about accepting the plea, I felt I had no choice but to answer the questions as I did because I felt I was not physically able to

make it through the trial due to the pain." Glinski was permitted to withdraw so that he could testify at the evidentiary hearing, and successor counsel was appointed. After hearing the testimony of Glinski and Young, the circuit court denied the motion, determining that Young failed to establish a fair and just reason for plea withdrawal. The court imposed a sixty-year bifurcated sentence.

¶11 Young first argues that the circuit court erroneously exercised its discretion when it denied his request to proceed pro se made on the first day of his jury trial. The United States and Wisconsin Constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. ***State v. Darby***, 2009 WI App 50, ¶11, 317 Wis. 2d 478, 766 N.W.2d 770. To safeguard those rights, before granting a defendant's request to represent him or herself, a circuit court must undertake an examination to ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent and that the defendant is competent to proceed pro se. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). To invoke the right to self-representation and trigger the circuit court's duty, a defendant must clearly and unequivocally demand the right to proceed pro se. ***Darby***, 317 Wis. 2d 478, ¶¶18-19, 24. This not only protects a defendant from an inadvertent waiver of the right to counsel, it also "prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." ***Id.***, ¶20 (citations omitted).

¶12 Similarly, "the right to counsel cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the administration of justice." ***Hamiel v. State***, 92 Wis. 2d 656, 672-73, 285 N.W.2d 639 (1979) (emphasis and citation omitted). The right to counsel and the right to self-representation "are not intended to allow the defendant the opportunity to avoid or delay the trial for any unjustifiable reason." ***Id.*** at 673 (emphasis omitted).

"Where the request to proceed pro se is made on the day of trial or immediately prior thereto, the determinative question is whether the request is proffered merely to secure delay or tactical advantage." ***Id.*** (emphasis omitted). Whether to grant a late request to proceed pro se is a matter of discretion for the circuit court. ***Id.*** at 672.

¶13 We conclude that the circuit court properly exercised its discretion in denying Young's eleventh-hour request to proceed pro se.[1] After reviewing the history of the case and upon consideration of factors such as Young's failure, despite multiple opportunities, to request to proceed pro se, the circuit court determined that Young's request was intended as a dilatory tactic. This determination is well supported by the record. Not only did Young's request come on the first day of trial, it was prompted by the circuit court's refusal to accept his plea. This is fully consistent with what the circuit court characterized as Young's pattern of finding reasons to delay every time a trial date approached. Further, Young's representation was the subject of multiple hearings, each one an opportunity to assert his desire to represent himself. In fact, the circuit court had directly informed Young of his right to proceed pro se. Instead, Young expressed displeasure when told he had forfeited his right to counsel and, when given the choice, confirmed that he wanted advocate rather than standby counsel.

¶14 Next, Young argues that the circuit court erroneously exercised its discretion when it denied his presentence motion for plea withdrawal. A

[1] In light of the context and references to co-counsel, we are not necessarily convinced that Young ever made a clear and unequivocal request to proceed pro se. However, because the parties' arguments presume that Young did make such a request, we assume for purposes of this decision that he clearly and unequivocally informed the circuit court of his desire to represent himself.

defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. "If the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea." ***Id.***, ¶34 (internal quotations omitted). The circuit court's findings of evidentiary or historical fact, including its credibility determinations, will be upheld unless they are clearly erroneous. ***Id.***, ¶33.

¶15 After considering the testimony of Glinski and Young, the circuit court found Young's testimony and his proffered reason for plea withdrawal not credible:

> The court does not find it to [be] a credible reason for the following reasons: One, he never told his attorney. Two, my observations during the long colloquy in which he did not mention it to me either and my observations during both colloquies … which showed Mr. Young to be responsive to all of my questions. He did not delay in his response as if he was distracted by pain. He did not seem confused by my questions which would also show that he was distracted by pain or unable to focus on the questions that I was asking him.

¶16 The circuit court's well-considered and lengthy oral decision was demonstrably based on the facts of record and the applicable law. ***Id.***, ¶30. We will not interfere with its proper exercise of discretion.

By the Court.—Judgment affirmed.

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