

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2009

David R. Schanker
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. 2008AP506-CR

Cir. Ct. No. 2006CF584

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN M. YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Judgment affirmed in part, reversed in part; order reversed and cause remanded.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Sean Young appeals from a judgment of conviction of using a computer to facilitate a child sex crime, felon in possession of a firearm, and carrying a concealed weapon, and from an order denying his

motion for postconviction relief. The two issues we address are whether Young was denied his constitutional right to represent himself at trial and whether the vehicle stop which led to Young's arrest was illegal. We affirm the denial of Young's motion to suppress evidence based on the vehicle stop and reverse the conviction because Young was denied his right to self-representation. We remand for a new trial.

¶2 Young communicated over the internet with a girl he believed to be fifteen years old. On the other end of those conversations was an operative of an internet sting operation conducted by a citizens' group, Perverted Justice, in conjunction with a Milwaukee television station. A member of the group posing as the girl spoke with Young and arranged for Young to meet her at a certain house for dinner. Young's vehicle was stopped in the vicinity of the residence. The facts surrounding the vehicle stop will be set forth later in the opinion.

¶3 On August 17, 2006, just a little over six weeks before the October 3, 2006 trial date, Young discharged his privately retained attorney and indicated that he wanted to represent himself. Although he talked to the trial court about possibly having counsel to assist him with note taking and jury selection, in the end Young firmly declared that he wanted to go pro se without any co-counsel. The court determined that Young voluntarily and knowingly waived his right to counsel and allowed his attorney to withdraw.

¶4 The next day the trial court called a conference and expressed concern that it had not addressed whether Young was competent to proceed pro se, particularly in light of the short time available to prepare for the approaching jury trial. The court appointed standby counsel to assist Young with consultation, cross-examination, examination of witnesses, closing argument, preserving

appellate issues, introducing evidence, customizing jury instructions, and throughout the trial. Attorney Anthony Cotton was appointed in that capacity. Young confirmed that he still wanted to proceed pro se without having an attorney do everything. At the end of the conference, the trial date was changed to October 10, 2006.

¶5 When the trial court heard pretrial motions, both Attorney Cotton and Young argued the motions and cross-examined the police officer with respect to the suppression of the vehicle stop. On the first day of trial, Attorney Cotton did the jury voir dire examination. Young indicated that Attorney Cotton would also make a brief opening statement. The prosecutor raised concern that in light of Attorney Cotton's active role he was not acting just as standby counsel but that a prohibited hybrid representation was occurring. Young responded that he was satisfied with the way things were going because he had informed Attorney Cotton of the things he wanted raised and Attorney Cotton was more efficient in presenting those things. Attorney Cotton expressed the view that the level of his participation could destroy the jury's perception that Young was representing himself. Young asked the trial court to permit the hybrid representation because it was more efficient. The trial court confirmed that Young would not be permitted to make the opening or closing statement and approved proceeding with the hybrid representation. Thereafter, Young questioned two witnesses after cross-examination by Attorney Cotton.

¶6 At the start of the second day of trial, the trial court sua sponte raised whether the hybrid representation should continue. It found that the hybrid representation wasn't working and was "contrary to a unified defense." It confirmed its finding that Young was not competent to proceed pro se and observed that Attorney Cotton was well-prepared and was indeed handling the

majority of the case. The court ordered that Attorney Cotton continue as counsel of record and that Young would not be allowed to proceed pro se. Young asserted a desire to do the closing argument himself and in the face of not being allowed to do that, he indicated that he wanted to fire Attorney Cotton. The trial court refused to allow Young to fire his attorney. Young responded that he would no longer participate in the trial or otherwise communicate with his trial attorney. The remainder of the trial was handled by Attorney Cotton only.¹

¶7 A criminal defendant has a constitutional right to conduct his own defense. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). When a defendant “knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself.” *Id.* at 204. However, a criminal defendant does not have a constitutional right to be actively represented in the courtroom both by counsel and by himself. *Moore v. State*, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978). It is within the trial court’s discretion to permit the hybrid representation that occurred here.² See *State v. Campbell*, 2006 WI 99, ¶¶66, 74, 294 Wis. 2d 100, 718 N.W.2d 649 (the role of standby

¹ A conference between the court and the attorneys reflects that Young was disruptive in the courtroom. Attorney Cotton reported that Young was 100% uncooperative and making offensive remarks against Attorney Cotton, his family, and his profession. The court admonished Young to curb his disruptive behavior.

² *Moore v. State*, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978), does not absolutely prohibit hybrid representation. First, *Moore* recognized that the trial court has discretion to permit co-attorneys to divide up the trial duties. *Id.* at 302. Secondly, *Moore* was not a situation where, like here, the defendant knowingly and voluntarily waived his right to counsel and elected to conduct his own defense. *Id.* When it was obvious that representation of stand-by counsel had transformed into hybrid representation, Young agreed to allow Attorney Cotton to take the bulk of duties and the trial court allowed it. Young waived his right to claim that Attorney Cotton’s representation violated a prohibition against hybrid representation.

counsel can vary and recognizing that this type of “double-barrel” representation occurs); *State v. Lehman*, 137 Wis. 2d 65, 81, 403 N.W.2d 438 (1987) (the scope of the duties of stand-by counsel lies within the discretion of the trial judge); *State v. Debra A. E.*, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994) (appellate court is not precluded from exercising its discretion in accepting a pro se brief when the appellant is represented by counsel). Conversely, the trial court may exercise its discretion to terminate the pro se representation and require stand-by counsel to assume full representation, contrary to the desire of the defendant. See *State v. Haste*, 175 Wis. 2d 1, 31 n.7, 500 N.W.2d 678 (Ct. App. 1993). See also *Dane County Dep’t of Human Servs. v. Susan P.S.*, 2006 WI App 100, ¶21, 293 Wis. 2d 279, 715 N.W.2d 692 (the court has a continuing responsibility to insure that the person’s competence for self-representation holds true and if, during the course of the proceedings, it becomes apparent that a person is incompetent for purposes of self-representation, a court should rescind the right and assign counsel).

¶8 Young challenges the decision on the second day of trial to terminate his pro se participation as well as the trial court’s refusal to let him discharge appointed counsel and proceed pro se.³ The State argues that the decisions can be sustained because the trial court found Young incompetent to represent himself. We review the determination of whether a defendant is competent to proceed pro se under the clearly erroneous standard of review. *State v. Marquardt*, 2005 WI 157, ¶21, 286 Wis. 2d 204, 705 N.W.2d 878. We must afford some deference to the trial court’s determination because it is based to a large extent on the judgment

³ The trial court’s determination that Young knowingly, intelligently, and voluntarily waived his right to counsel is not challenged on appeal.

and experience of the trial judge and his or her own observation of the defendant. *Dane County Dep't of Human Servs.*, 293 Wis. 2d 279, ¶22.

¶9 In determining whether a defendant is competent to represent himself the trial court should consider “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 person of average ability and intelligence should not be prevented from representing themselves. *Id.* *Dane County Department of Human Services*, 293 Wis. 2d 279, ¶19, recognizes additional considerations as:

the complexity of the case, the ability to put the other side to its burden of proof, the ability to understand what is necessary to present a defense, experience in the legal system, a person’s actual handling of the case, whether the person is unruly or unmanageable, physical disabilities, psychological disabilities, mental illness, and the opinion of medical and psychological experts regarding self-representation competency if the opinions identify relevant and specific problems.

¶10 The record establishes that Young was literate and fluent in English and that he had some college education. He did not suffer any physical or psychological disability impairing his ability to communicate a possible defense to the jury. In expressing his desire for self-representation, Young indicated that he had represented himself before in court and he had never lost a case. In response to Young’s postconviction motion, the trial court observed that Young was completely out of line with courtroom decorum, that he was disruptive, profane, interrupting, and not able to assist in his defense. That conduct occurred after the trial court denied Young the right to participate in the defense. The State does not

cite one instance of such conduct that occurred before the trial court stripped Young of his participation at trial.

¶11 The trial court questioned Young's competency to represent himself because the trial date was fast approaching under Young's speedy trial demand and, as an incarcerated individual, Young would not be able to prepare for trial or interview witnesses. However, a person's lack of technical legal knowledge does not disqualify a person from self-representation. *Id.*, ¶20. The inability to interview witnesses, have direct access to a law library, and file appropriate motions are merely disadvantages of self-representation that every defendant must accept as a consequence of choosing self-representation. On the second day of trial, when stand-by counsel was directed to take over the defense, the trial court repeated the theme that Young lacked training as an attorney. The court stated: "Attorneys are trained. They prepare questions with a strategy and a defense in mind, and with Mr. Young asking questions that don't necessarily fit that game plan, they could be at odds, and there is no unified defense." The trial court appointed stand-by counsel and then directed counsel to take over the defense not because Young was incompetent but because it was in his best interest. That was the wrong standard to apply in denying Young the right to conduct his own defense.

¶12 We conclude that the trial court's finding that Young was not competent to represent himself without counsel was clearly erroneous. Young was denied his constitutional right to present his own defense. Young is entitled to a new trial.

¶13 Because a new trial is ordered, we need not address the additional issues of ineffective assistance of counsel and the giving of the entrapment

instruction. We do, however, address the trial court's denial of Young's suppression motion.

¶14 Between noon and 9:00 p.m., police conducted surveillance at the address where Young was supposed to meet the girl he had been on-line chatting with. Based on what Young had told the girl, officers were instructed to be on the look-out for a dark colored SUV that would "stand out." Young's vehicle matched that description as it had distinctive yellow writing on the back window. Officers observed the vehicle pass the target residence twice during the evening surveillance. At the conclusion of the surveillance, a member of the arrest team was being transported back to his squad car when Young's vehicle was observed in the vicinity. Although the officers did not immediately follow Young's vehicle, they came across it again and observed it signal for a left turn but actually turn right. The officers later realized the vehicle had made a u-turn and was following them. They allowed the vehicle to pass, followed it, and then stopped it.

¶15 Whether a traffic stop violated a defendant's constitutional rights because it was not based on reasonable suspicion presents a question of constitutional fact that we review as a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We review the trial court's findings of historical fact under the clearly erroneous standard and independently review the application of those facts to constitutional principles. *Id.* An investigative stop must be constitutionally reasonable. *Id.*, ¶12. To meet its burden of establishing reasonableness, the State must show that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *Id.*, ¶10 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and

experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.*, ¶13.

¶16 Young argues that the officers lacked any reasonable suspicion that he had or was about to commit a crime related to facilitating a child sex crime because there was inadequate information about the suspect’s vehicle. However, the officers observed Young commit a traffic offense.⁴ The observation of a traffic violation provides reasonable grounds for an investigatory stop. *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999); *State v. Griffin*, 183 Wis. 2d 327, 334, 515 N.W.2d 535 (Ct. App. 1994). That Young was not issued a citation for a traffic violation or that the stop was subjectively pretextual is of no consequence as long as there was a reasonable suspicion to stop him in the first place. *See State v. Gaulrapp*, 207 Wis. 2d 600, 609-10, 558 N.W.2d 696 (Ct. App. 1996). The stop of Young’s vehicle did not violate his constitutional rights and his motion to suppress evidence obtained after the stop was properly denied.

⁴ It is not clear if the traffic violation was the right turn while signaling for a left turn or an illegal u-turn. *See* WIS. STAT. §§ 346.34(1)(b); 346.33(1)(c) The record does not include the trial court’s findings of historical fact. Although Young states that his motion to suppress the stop was not decided until the first day of trial, the docket entries reflect that the court denied the motion at the hearing where the police officer testified. Indeed, on the first day of trial the trial court made reference to having found that the officer had a reasonable suspicion. Later that day, after reviewing some video evidence, the trial court stated that it “renews” its ruling. The transcripts of the motion hearing end at the point where the State rested with respect to the reasonable suspicion motion. The trial court’s findings and ruling are not part of the record. Appellants have the burden to provide an appellate record sufficient to review the issues they raise on appeal. *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). If the record is incomplete we may assume it supports the trial court’s ruling. *See Galatowitsch v. Wanat*, 2000 WI App 236, ¶23 n.8, 239 Wis. 2d 558, 620 N.W.2d 618. Thus, in the absence of a contrary finding, we may rely on the police officer’s testimony that he observed a traffic violation.

By the Court.—Judgment affirmed in part, reversed in part; order reversed and cause remanded.

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

