**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 29, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP2439-CR** **Cir. Ct. No. 2010CF2660**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT L. TATUM,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Robert L. Tatum, *pro se*, appeals from an order denying his postconviction motion for a new trial. Tatum contends that the trial court erroneously: denied his right to self-representation, violated his statutory

right to a speedy trial pursuant to WIS. STAT. § 971.10 (2009-10),[1] and denied his motion to suppress evidence. We affirm the trial court on all grounds.

## BACKGROUND

¶2 On May 27, 2010, Tatum was charged with two counts of first-degree intentional homicide, by use of a dangerous weapon, stemming from the shooting deaths of two of his roommates, Kyle Ippoliti and Ruhim Abdella. According to the criminal complaint, on the night of May 22, 2010, police were dispatched to a home at 2517 North Richards Street, Milwaukee, where they found the bodies of the victims. One of the residents of the home told police that she, along with the victims, Tatum, and a few others, all resided at the Richards Street home together. She further stated that on May 20, 2010, Tatum was evicted from the home by Ippoliti and later had an argument with Abdella. The resident also told police that when she came home on the night of May 22, 2010, she learned that Ippoliti and Abdella had been murdered. A neighbor of the victims told police that she heard gunshots coming from the victims' home on the night of the murders. The complaint also contains statements from another witness, who told police that in the hours before the shooting he saw Tatum at the Richards Street home.

¶3 Tatum was subsequently arrested and charged. On July 20, 2010, Tatum, by counsel, made a speedy trial demand and the case was calendared for a jury trial on November 29, 2010. However, on August 12, 2010, by Tatum's request, Tatum's counsel moved to withdraw. The trial court allowed the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

withdrawal and vacated Tatum's speedy trial demand because Tatum requested a new attorney.

¶4 On September 23, 2010, successor counsel filed a motion to suppress evidence based on the warrantless search and seizure of Tatum's car. Before the trial court decided the motion, however, successor counsel moved to withdraw. Successor counsel told the trial court that Tatum shared confidential information with his (Tatum's) mother, a material witness, thereby compromising successor counsel's position. The trial court granted successor counsel's motion. Although the trial court again vacated Tatum's speedy trial demand, the case remained calendared for November 29, 2010.

¶5 Tatum's third, and final, attorney informed the trial court that she could not be prepared for trial on the calendared date. A new date was set for January 31, 2011. On January 18, 2011, Tatum's counsel, Attorney Dianne Erickson, requested a competency evaluation of Tatum. A hearing was held the following day, during which the trial court ordered Tatum evaluated by the Department of Health Services. The parties appeared before the trial court again on January 24, 2011, for the return of Tatum's competency evaluation. The evaluation report stated that the examining psychologist was unable to form an opinion as to Tatum's competency. The trial court remanded Tatum to a state mental health facility for an inpatient evaluation. To avoid delaying his trial, Tatum told the trial court that he would "rather just represent myself if [my trial counsel] finds that my competency is not up to her standards." The trial court responded: "[w]e'll see what happens."

¶6 The parties returned to the trial court again on February 24, 2011, following the return of Tatum's inpatient evaluation. The evaluation, conducted

by Dr. Laurence Trueman, found that Tatum was competent to understand the proceedings and assist in his defense, but stated that Tatum would "in all likelihood continue to be an extremely challenging defendant." At the same hearing, Tatum asked the trial court to dismiss Attorney Erickson, stating that she was working with the State and not investigating his case in accordance with his standards, forcing him (Tatum) to investigate his case on his own. Tatum also acknowledged that he refused to meet with Attorney Erickson out of frustration with counsel's competency challenge. The trial court asked Tatum whether he was requesting a new attorney or asking the trial court to allow him to represent himself. Tatum stated that he wished to represent himself. The trial court found Tatum competent to stand trial; however, after engaging in a colloquy with Tatum, denied his request to represent himself. The trial court stated that Tatum's limited education would make it difficult for him to understand the difficulties and disadvantages of self-representation. The trial court also refused to dismiss Attorney Erickson. The trial was then calendared for a jury trial on April 4, 2011.

¶7 On April 4, 2011, the trial court addressed Tatum's previously-filed motion to suppress evidence. The State called one witness, Detective Erik Gulbrandson, to establish the basis for the search and seizure of Tatum's car. Detective Gulbrandson testified that prior to the search and seizure, two witnesses had placed Tatum at the scene of the crime hours before the shooting, one of whom stated that Tatum's car was also at the scene. Detective Gulbrandson also stated that a witness reported hearing gun fire come from the Richards Street house on the night of the shooting, while another witness told police that Tatum had been evicted by one victim and was heard arguing with the other. Based on that information, police began looking for Tatum. Detective Gulbrandson also stated that another witness told police that on the morning following the murders,

he (the witness) saw Tatum's car parked behind an abandoned home and covered by bushes. The vehicle was later found at Tatum's mother's house, where it was towed by police. Based on Detective Gulbrandson's testimony, the trial court denied the motion to suppress.

¶8 Tatum was found guilty of both counts of first-degree intentional homicide by the jury. He was sentenced to life in prison without the possibility of release to extended supervision. Tatum filed a number of *pro se* motions, despite being represented by postconviction counsel, including a motion for postconviction relief and a new trial. The motion was denied. Tatum's postconviction counsel filed a motion to withdraw and Tatum continued to file a series of *pro se* motions. We granted Tatum's postconviction counsel's motion to withdraw and allowed Tatum to proceed *pro se*. On appeal, Tatum argues that he was denied the rights to self-representation and to a speedy trial, and that the trial court erroneously denied his motion to suppress evidence.[2] Additional facts are included as relevant to the discussion.

## DISCUSSION

### I. Self-Representation.

¶9 Tatum argues first that the trial court improperly denied him his right to self-representation. We disagree.

¶10 "The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served." ***State v. Klessig***, 211 Wis. 2d 194, 201,

[2] Although Tatum's arguments on appeal are unrelated to the order he appeals from, we nonetheless address his arguments because all were raised during the course of his trial.

564 N.W.2d 716 (1997). "The Sixth Amendment and Article I, § 7 [of the Wisconsin Constitution] also give a defendant the right to conduct his [or her] own defense." ***Id.*** at 203. A defendant must "clearly and unequivocally" invoke his or her right to self-representation. ***State v. Darby***, 2009 WI App 50, ¶24, 317 Wis. 2d 478, 766 N.W.2d 770. When a defendant seeks to proceed *pro se*, the trial court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed *pro se*. ***Id.***, ¶17. "Whether a defendant was denied his or her 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.

¶11 "In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." ***Klessig***, 211 Wis. 2d at 212. "To prove such a valid waiver of counsel, the [trial] court must conduct a colloquy designed to ensure 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 on him [or her]." ***Id.*** at 206. "In making a determination on a defendant's competency to represent himself, the [trial] court should consider factors such as '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.'" ***Id.*** at 212 (citation omitted).

¶12 Tatum argues repeatedly that, in accordance with Dr. Trueman's evaluation, the trial court found Tatum competent and therefore should have

allowed him to proceed *pro se*. Tatum fails to recognize the difference between the trial court's determination that Tatum was competent to stand trial, but not able to represent himself. The trial court conducted a colloquy with Tatum, during which it established that Tatum had a tenth-grade education. The trial court then questioned Tatum about his knowledge of court procedures, the charges against him and his awareness of the general range of penalties that could be imposed on him. The trial court determined that while Tatum understood the seriousness of the charges against him and the general range of penalties for those charges, he lacked an adequate understanding of the difficulties and disadvantages of self-representation.

¶13 We agree with the trial court that Tatum did not demonstrate an understanding as to the implications of self-representation. Tatum's request to represent himself was a result of his frustration with his counsel for challenging his competency. Up until that point, Tatum had accepted representation from three attorneys. Tatum's request that the trial court dismiss Attorney Erickson and allow him to represent himself stemmed from his frustration over the competency request, his belief that Attorney Erickson was really working with the State, and his belief that Attorney Erickson and her investigator were not obtaining proper information. Tatum told the trial court that he independently conducted investigations from his jail cell, was prepared to move forward with his case based on information obtained from his independent investigations, and believed that the trial court had the authority to order that he be "forced to have court resources." Tatum's beliefs and remarks, as reflected by the record, reflect his limited understanding of the scope of a proper investigation for the defense of homicide charges. Tatum's behavior during the hearing, reflected in the record by constant interruptions, shows also that Tatum did not understand courtroom decorum and

legal technicalities. Because the record reflects that Tatum did not demonstrate a proper understanding of the challenges and potential consequences of proceeding *pro se*, the trial court properly denied his request to represent himself.

**II. Speedy Trial.**

¶14 Tatum also contends that the trial court violated his right to a speedy trial pursuant to WIS. STAT. § 971.10. The statute provides, in relevant part:

> **(2)**(a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.
>
> (b) If the court is unable to schedule a trial pursuant to par. (a), the court shall request assignment of another judge pursuant to s. 751.03.

¶15 Here, Tatum was charged on May 27, 2010. He made a speedy trial demand on July 20, 2010, and the case was calendared for trial on November 29, 2010. Tatum was tried on April 4, 2011. Nonetheless, we reject Tatum's contention.

¶16 Our supreme court noted in ***Day v. State***, 60 Wis. 2d 742, 744, 211 N.W.2d 466 (1973), that the purpose of WIS. STAT. § 971.10 "was to provide an orderly and flexible manner of court administration which the state or an accused might make use of to expedite a trial." However, "'[t]he constitutional requirements of a speedy trial are in no way modified by this section.'" ***Day***, 60 Wis. 2d at 744 (citation omitted). Because Tatum does not argue a violation of his constitutional rights, we focus solely on his statutory argument, keeping in mind that § 971.10 "does not provide the standard by which speedy trial violations are

measured." *See* ***State v. Lemay***, 155 Wis. 2d 202, 213 n.3, 455 N.W.2d 233 (1990).

¶17 Here, multiple delays were caused by attorney withdrawals—Tatum requested the dismissal of his first attorney, and his second attorney moved to withdraw based on Tatum's disclosure of confidential information to a material witness. Tatum's third attorney, Attorney Erickson, appeared before the trial court for the first time on November 5, 2010, and told the trial court on November 8, 2010, that she would not be prepared to try the case by the original November 29, 2010 trial date. The withdrawal of Tatum's first two attorneys was a result of Tatum's own conduct—he requested the dismissal of his first attorney and revealed confidential information which compromised his second attorney. "The law is that a defendant 'cannot be heard to complain about delay caused by his own conduct[.]'" ***State v. Miller***, 2003 WI App 74, ¶14, 261 Wis. 2d 866, 661 N.W.2d 466 (citation omitted).

¶18 Attorney Erickson's competency evaluation request, along with the subsequent examinations, further delayed the case. As our supreme court held in ***Norwood v. State***, 74 Wis. 2d 343, 355, 246 N.W.2d 801 (1976), delays related to questions of competency are "justifiable and valid" because "[n]othing could be more intrinsic to a criminal case than a determination of the defendant's competency to participate in his own defense." We conclude that the months of competence-related delays[3] were intrinsic to the case and the counsel-related

[3] Tatum's trial counsel requested a competency evaluation on January 18, 2011. Because the initial evaluation was inconclusive as to Tatum's competency, another evaluation was conducted. Tatum was determined to be competent by the trial court, following the latter evaluation, on February 24, 2011.

delays[4] were occasioned by Tatum himself. Therefore, no statutory violation occurred. As such, we do not address Tatum's argument that the statutory violation somehow deprived the trial court of its competency to hear Tatum's case.

**III. Motion to Suppress.**

¶19 Tatum contends that the trial court erroneously denied his motions to suppress evidence obtained from the warrantless search and seizure of his vehicle and certain statements.[5]

¶20 We review motions to suppress under a two-prong analysis. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. "First, we review the [trial] court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, we review the application of constitutional principles to those facts *de novo*." ***Id.*** (internal citations omitted). "Whether police conduct violated a defendant's constitutional rights under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures presents a question of constitutional fact that this court independently reviews." ***State v. Felix***, 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775.

¶21 To determine whether the warrantless search and seizure violated Tatum's constitutional rights, "we must consider (1) whether there was probable

[4] Tatum requested the withdrawal of his first counsel, which was granted by the trial court on August 12, 2010. Tatum's second counsel was dismissed on October 25, 2010. Attorney Erickson appeared before the trial court for the first time on November 5, 2010, and told the trial court on November 8, 2010, that she could not be prepared for a November 29, 2010 trial date. The trial date was reset for January 31, 2011.

[5] We do not address Tatum's argument that the trial court erroneously denied his motion to suppress certain statements—no such motion was decided by the trial court. Further, the statements Tatum complains of were not made to law enforcement.

cause to search [Tatum's] vehicle; and (2) whether the vehicle was readily mobile." *See* ***State v. Marquardt***, 2001 WI App 219, ¶¶31, 33, 247 Wis. 2d 765, 635 N.W.2d 188.

**A. Probable Cause.**

¶22 Whether probable cause exists depends on the totality of the circumstances, and is a flexible, commonsense standard. *See* ***State v. Tompkins***, 144 Wis. 2d 116, 123-25, 423 N.W.2d 823 (1988). Probable cause requires only that there is a "'fair probability'" that evidence of a crime will be found. ***State v. Hughes***, 2000 WI 24, ¶21, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). The test is what a reasonable police officer would reasonably believe under the circumstances. ***State v. Erickson***, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407.

¶23 Here, according to the testimony of Detective Gulbrandson, police had witness statements related to Tatum's eviction and his presence at the Richards Street home on the night of the shooting. Detective Gulbrandson also testified that a neighbor of the victims told police that on the morning after the shooting he discovered Tatum's car parked behind an abandoned house, hidden by bushes. The same neighbor later took Tatum's brother to the vehicle, still parked behind an abandoned house, where they found Tatum sitting in the front seat. Detective Gulbrandson further stated that when police went to Tatum's mother's home later that same day, Tatum's car was parked outside of the residence. When the police arrived at Tatum's mother's home, Tatum's brother told police that he (Tatum's brother) had been in possession of Tatum's car from the day of the homicide onward, though police knew that to be false. Given all of the information police had regarding Tatum's eviction, his argument with a victim, his

whereabouts, and his brother's attempted cover-up, police reasonably concluded that there was a fair probability of locating evidence related to the homicides in Tatum's car.

**B. Readily Mobile.**

¶24 A vehicle is readily mobile even if the driver and occupants have been arrested because, although their arrest makes the vehicle less accessible to those individuals, it would not prevent other unknown individuals from moving the vehicle. *See* ***Marquardt***, 247 Wis. 2d 765, ¶42. The record reflects that from the time of the homicide until Tatum's arrest, Tatum's car was at three known locations—the homicide scene, behind an abandoned house, and at Tatum's mother's house. Clearly the vehicle was operational and readily mobile.

¶25 Despite Tatum's contention that his car was his primary residence and he was therefore entitled to greater privacy, the fact remains that Tatum's car was indeed a vehicle subject to Wisconsin's automobile exception. *See* ***id.***, ¶¶32-33. Police had probable cause to believe that evidence of the homicides could be located in Tatum's operational and readily mobile car. Therefore, it was not unreasonable for police to search the vehicle for evidence of a crime.

¶26 For all the foregoing reasons, we affirm the trial court.

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.