COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1015-CR **Cir. Ct. No. 2000CF1310**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFERY A. WAGNER and DAVID L. BOROWSKI, Judges. *Affirmed.*

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

¶1 BRENNAN, J. Rodney Washington appeals from a judgment entered upon a jury's verdict, convicting him of four counts of first-degree sexual assault with the use of a dangerous weapon, and three counts of second-degree

sexual assault of a child, and from an order denying his postconviction motion.[1] Washington complains that his trial counsel was ineffective for failing to move to dismiss the complaint. He contends that the trial court lacked personal jurisdiction because the criminal complaint and arrest warrant that were filed in 2000 did not identify him with reasonable certainty, and thereby failed to toll the statute of limitations. In the alternative, he argues that the trial court erred when it denied his request to represent himself at trial and his request for substitution of counsel. We disagree on all accounts and affirm the trial court for the reasons set forth below.

BACKGROUND

¶2 On March 16, 2000, eleven days before the statute of limitations was to run, the State filed a John Doe criminal complaint, charging John Doe #5 with four counts of first-degree sexual assault with use of a dangerous weapon, one count of second-degree sexual assault with use of force, and three counts of robbery. All of the crimes were alleged to have occurred between March 27, 1994, and January 14, 1995. The identifying information in the caption of the complaint described John Doe #5 as an "Unknown Male with Matching Deoxyribonucleic Acid (DNA) Profile at Genetic Locations D1S7, D2S44, D4S139, D5S110, D10S28, and D17S79." John Doe #5's actual DNA profile was not included anywhere in the complaint. The trial court found probable cause based on the criminal complaint and issued an arrest warrant for John Doe #5 the same day.

[1] The Honorable Jeffery A. Wagner presided over all pre-trial and trial proceedings and entered the judgment of conviction. The Honorable David L. Borowski denied Washington's postconviction motion.

¶3 Seven years later, on June 25, 2007, a databank unit leader at the Wisconsin State Crime Lab matched Washington's DNA to the DNA on each of the victims. On August 8, 2007, the State filed an amended complaint, naming Washington as the defendant. Unlike the original complaint, the amended complaint listed a series of numbers at each of the genetic locations, thereby providing information as to the perpetrator's specific DNA profile.

¶4 Soon thereafter, Washington was appointed counsel. However, only a short time later, in November 2007, counsel filed a motion to withdraw, citing a breakdown in communication. The trial court granted the motion and new counsel was appointed.

¶5 Four months before trial, Washington submitted a *pro se* "notice" to the court, stating that "if [my attorney] do[es] not file any motions to dismiss this case out of court when I come before you, I will be going *pro se* to defend myself in this case on that date of Feb. 14, 2008." During a hearing on February 14, 2008, Washington reiterated: "I just want to go *pro se* in this case and defend myself." After a brief recess, Washington's attorney informed the court that he "talked to Mr. Washington in the back. … [H]e's withdrawing his request to go *pro se*." The trial court asked Washington if that was correct, and Washington affirmed that he was withdrawing his request.

¶6 At a hearing on April 28, 2008, Washington again requested to represent himself. After a recess, Washington informed the court that he did not feel he was being properly represented by counsel and that it was his intent to go *pro se*. The court then asked whether Washington understood that he was required to follow the rules of the court, the rules of evidence, and case law, to which Washington replied:

> DEFENDANT: I have no problem with that.
>
> THE COURT: Well, do you know the rules of evidence, sir?
>
> DEFENANT: Do I what?
>
> THE COURT: Know the rules of evidence?
>
> DEFENDANT: When they are brought to my attention, I will know.
>
> THE COURT: So that would certainly help to have a lawyer help you do that.
>
> DEFENDANT: It won't be this one.

¶7 The trial court then went on to deny Washington's request to proceed *pro se*, citing the difficulty of understanding the DNA evidence in the case:

> THE COURT: Well, here is the problem with proceeding pro [se] like you want to, and you have a right to do that unless the court doesn't feel that you're competent to do that and the court doesn't believe that you're competent to do that and I'll tell you why, because of the DNA. The DNA that's involved in this case which is scientific and very few people outside the legal profession and scientists know how that works. And in order to develop and cross-examine those witnesses, you have to have some knowledge in doing that. Even if you knew some of the rules of evidence and were capable in other ways in order to represent yourself, that's a big issue.

In addition, the court noted that it had concerns about Washington cross-examining the witnesses because it was a sexual assault case.

¶8 After the court refused to grant Washington's request to proceed *pro se*, Washington requested substitute counsel. The trial court denied his request finding that it was the first day of trial, that Washington had already substituted counsel once before, and that Washington's current counsel was prepared to try the case.

¶9 Following the trial, a jury convicted Washington of four counts of first-degree sexual assault with the use of a dangerous weapon and three counts of second-degree sexual assault of a child. He was subsequently sentenced to 100 years of imprisonment.

¶10 Washington's appellate attorney filed a no-merit brief, stating that the complaint and warrant were properly filed, relying on ***State v. Dabney***, 2003 WI App 108, 264 Wis. 2d 843, 663 N.W.2d 366, and ***State v. Davis***, 2005 WI App 98, 281 Wis. 2d 118, 698 N.W.2d 823. Washington then filed a *pro se* response to the no-merit brief, arguing that the DNA information in the original complaint and arrest warrant failed to identify the accused with reasonable certainty. In response to Washington's response brief, we asked appellate counsel to address the following issues:

> (1) whether the arrest warrant or complaint identified Washington sufficiently to toll the statute of limitations; (2) whether the trial court erred by denying Washington's request to proceed without counsel; (3) whether the court erred by denying Washington's request to have new counsel appointed; and (4) whether Washington's trial counsel was ineffective at sentencing by agreeing with the State's recommendation.

Through new counsel, Washington filed a motion requesting that we dismiss his no-merit appeal and return the case to the trial court, to permit him to file a postconviction motion. We granted the motion.

¶11 Washington subsequently filed a motion for postconviction relief pursuant to WIS. STAT. §§ 809.30 and 974.02 (2011-12).[2] In the motion, he

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argued, as relevant to this appeal, that his trial counsel was ineffective for "failing to move the [trial] court to dismiss for lack of personal jurisdiction because the original complaint and warrant failed to identify Washington by name or any other identifying characteristics, including a DNA profile."[3] Following a hearing and extensive DNA testimony, the trial court denied the motion. Washington appeals.

¶12 We include additional facts in the discussion section as necessary to the appeal.

DISCUSSION

¶13 Washington's primary argument on appeal is that his trial counsel was ineffective for failing to move to dismiss the complaint for lack of personal jurisdiction because the DNA information contained in the original complaint and arrest warrant did not identify him with reasonable certainty. In the alternative, he argues that the trial court erred in denying him his request to represent himself at trial and denying his subsequent request for substitution of counsel. We address each concern in turn.

I. Trial counsel was not ineffective because the trial court had personal jurisdiction.

¶14 Washington first argues that his trial counsel was ineffective for failing to challenge the trial court's jurisdiction because the original complaint and arrest warrant, filed eleven days before the expiration of the statute of limitations, did not identify him with reasonable certainty. More specifically, he argues that

[3] Washington also raised another issue concerning his representation during sentencing that he does not raise on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court but not raised on appeal is deemed abandoned.).

the complaint and warrant did not identify his specific DNA profile, but rather only listed six genetic locations common to all human beings. Washington's claim raises a question of law that we review *de novo*. *See* ***Dabney***, 264 Wis. 2d 843, ¶9.

¶15 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶16 For the reasons which follow, we conclude that the original complaint and arrest warrant were sufficiently specific to toll the statute of limitations and to confer the trial court with personal jurisdiction. Because Washington's trial counsel could not have been ineffective for failing to raise a meritless claim, we affirm. *See* ***id.***

¶17 "Personal jurisdiction in criminal cases involves the power of the circuit court over the physical person of the defendant." ***Dabney***, 264 Wis. 2d 843, ¶10. In order to confer personal jurisdiction: (1) a complaint or indictment must be filed stating that there is probable cause to believe that a crime has been

committed and that the defendant probably committed it, and (2) there must be compliance with the relevant statute of limitations.[4] ***Id.***

¶18 Throughout his brief, Washington argues that the original complaint and arrest warrant failed to identify him with "reasonable certainty," thereby failing to toll the statute of limitations. However, in doing so, Washington mistakenly applies the "reasonable certainty" requirement to both the complaint and the arrest warrant. *See* ***id.***, ¶12. "The 'reasonable certainty' requirement is specific to the warrant only." ***Id.*** WISCONSIN STAT. § 968.04(3)(a)4. requires an arrest warrant to "[s]tate the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which the person to be arrested can be identified with *reasonable certainty*." (Emphasis added.) The complaint need only set forth a written statement of the essential facts constituting the offense, including answering the question of who is being charged and why. ***Dabney***, 264 Wis. 2d 843, ¶12. We interpret Washington's appeal as arguing that the original complaint insufficiently identifies "who" is being charged. Regardless, the complaint and arrest warrant here meet both standards.

¶19 In ***Dabney***, we held that a John Doe complaint and arrest warrant that identified the defendant by a DNA profile satisfied the requirements that a complaint state "who" is charged and that the arrest warrant describe the person to be arrested with "reasonable certainty." ***Id.***, ¶¶8-15. In ***Davis***, we reaffirmed that "the State is permitted to file a complaint, which identifies the defendant only by his DNA profile." ***Id.***, 281 Wis. 2d 118, ¶32. The trial court relied on both

[4] The parties agree that the statute of limitations for Washington's crimes in 1994 and 1995 was six years. *See* WIS. STAT. § 939.74(1) (1993-94). Washington does not argue that the original complaint was not filed within the statute of limitations.

Dabney and ***Davis*** when finding that the original complaint and arrest warrant here adequately identified Washington. Washington attempts to distinguish this case, arguing that the complaints and arrest warrants in ***Dabney*** and ***Davis*** included the defendants' entire DNA profile, whereas here, the complaint and arrest warrant did not include a DNA profile, but rather, only included the locations of six DNA markers that are common to all human beings.

¶20 While Washington is correct that the original complaint and arrest warrant in this case do not include an individual DNA profile, we conclude that they are nevertheless specific enough to describe who committed the crime and do so with reasonable certainty. As set forth by the State:

> The captions of the criminal complaint and arrest warrant describe the defendant as "Doe, John #5, Unknown Male with Matching Deoxyribonucleic Acid (DNA) Profile at Genetic Locations D1S7, D2S44, D4S139, D5S110, D10S28, and D17S79[.]" The criminal complaint describes each sexual assault incident, details the evidence collected for each victim's case as a result of the sexual assault, details the chain of custody from the scene to the crime lab, describes the laboratory analysis that revealed the presence of semen, states that a DNA profile from the semen that was foreign to all of the victims was developed for the genetic locations tested, discusses how the Wisconsin DNA databank operates and how DNA profiles are searched, states that the charged sexual assault cases were linked by the DNA of the assailant, and states that the unknown male person involved in all of the sexual assaults can be expected to have a DNA profile that matches the DNA profile designated as D1S7, D2S44, D4S139, D5S110, D10S28, and D17S79, as charged in the complaint and listed in the warrant. The complaint supplied additional certainty and particularity to the genetic description of John Doe #5 by stating that based on the FBI DNA database, the probability of randomly selecting an unrelated individual who would have a DNA profile matching the six genetic location profile charged in the warrant and complaint was approximately one in 318 billion in the U.S. Caucasian population, one in 980 billion in the African-American population, and one in 130 billion in the U.S. Hispanic population.

(Record cites omitted.)

¶21 As noted by the State, and left unchallenged by Washington, the original complaint set out in exacting detail how the DNA samples in this case were collected, stored, and analyzed. Moreover, it explicitly stated that the defendant in this case is the individual whose DNA "[m]atch[es]" the DNA collected from the victims, and as the complaint notes, the chances of a random match for a nonrelative are substantially greater than one in a billion. While Washington finds fault with the fact that the actual DNA profile was not included in either the original complaint or the arrest warrant, the language in each requiring the defendant to be the individual who "[m]atch[es]" the DNA on file at the locations listed in the complaint and warrant is sufficient to describe "who" with "reasonable certainty." *See* ***Dabney***, 264 Wis. 2d 843, ¶15 ("a DNA profile is arguably the most discrete, exclusive means of personal identification possible").

¶22 We also reject Washington's argument that this case is sufficiently similar to ***State v. Belt***, 179 P.3d 443 (Kan. 2008), to require the same result and that the trial court did not sufficiently distinguish this case from ***Belt***. In ***Belt***, "[t]he complaint and warrant identified 'John Doe described by deoxyribonucleic (DNA) analysis as LOCI D2S44 and D17S79.'" ***Id.*** at 444. In other words, in ***Belt***, the complaint and warrant listed the DNA markers common to all human beings, but did not include the defendant's actual DNA profile at those locations and did not indicate that the defendant's DNA needed to match the profile collected at those markers. *See* ***id.*** The Kansas Supreme Court concluded that the complaint and warrant were invalid because without the perpetrator's unique DNA profile they failed to identify the defendant with sufficient particularity. ***Id.*** at 450-51. However, unlike in ***Belt***, here, the complaint and warrant did not just list

the DNA locations common to all human beings, but also stated that John Doe #5 was the individual whose DNA "[m]atch[ed]" the DNA collected from the victims at each of those markers. That language, in and of itself, distinguishes this case from ***Belt***. Furthermore, even if the complaint and arrest warrant in ***Belt*** were identical to the one before use, we are not bound by decisions made by the Kansas Supreme Court.

¶23 Given the specificity in the rest of the complaint, and the language stating that the defendant is the individual whose DNA "[m]atch[es]" the DNA profile collected through the process described, the failure to include the specific DNA in the original complaint or arrest warrant is not dispositive.

II. The trial court properly exercised its discretion when it denied Washington's request to represent himself.

¶24 In the alternative, Washington complains that the trial court improperly denied his request to represent himself. We disagree and affirm.

¶25 Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution guarantee both a criminal defendant's right to counsel and the right to defend oneself. ***State v. Klessig***, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). The Wisconsin Supreme Court has noted "the apparent tension between these two constitutional rights," stating "'that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.'" ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted).

¶26 In order to ensure that the right to counsel is upheld, before a defendant is permitted to represent himself or herself, "the [trial] court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** "If the [trial] court finds that *both* conditions are met, the court must permit the defendant to represent himself or herself." ***Id.*** (emphasis added). Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which we review independent of the trial court. ***Id.***, ¶19.

¶27 To establish the first prong—knowing, intelligent, and voluntary waiver—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 challenges and disadvantages of self-representation; (3) was aware of the seriousness of the charges; and (4) was aware of the general range of penalties that could be imposed. ***Klessig***, 211 Wis. 2d at 206.

¶28 To establish the second prong—competence—"the [trial] court should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability that may significantly affect his [or her] ability to communicate.'" ***Id.*** at 212 (citation omitted). "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." ***Id.***

¶29 "Whether a defendant is competent to proceed pro se is 'uniquely a question for the trial court to determine.'" ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted). "'It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at

least a meaningful defense.'" ***Id.*** (citation omitted). Appellate "review is limited to whether the [trial] court's determination is 'totally unsupported by the facts apparent in the record.'" ***Id.*** (citation omitted).

¶30 Washington argues that the trial court failed to undertake the full colloquy mandated by ***Klessig*** with respect to the first prong, that is, whether his waiver of counsel was knowing, intelligent, and voluntary. However, because the trial court properly determined that Washington was not competent to proceed *pro se*, it was unnecessary for the court to undergo the full ***Klessig*** colloquy. *See* ***Imani***, 326 Wis. 2d 179, ¶21. Furthermore, there are numerous facts in the record to support the trial court's finding that Washington was not competent to represent himself.

¶31 The trial court accurately noted that DNA evidence was central to the State's case. There was no dispute that the four victims had been sexually assaulted. All four testified that they were accosted by a stranger who said he had a gun, took them to a secluded area, and forced them to have mouth-to-penis intercourse; he also had penis-to-vagina intercourse with two of the victims. The victims described their assailant as a black man with a pockmarked or scarred face, but none of them identified Washington. In short, the DNA evidence was critical to determining Washington's guilt, and Washington needed to be able to understand and decipher that evidence to properly represent himself.

¶32 Washington argues that his statements at sentencing and his response to the no-merit report demonstrate that he had enough knowledge of DNA evidence to properly defend himself. But the question before us is not whether there is evidence in the record demonstrating that Washington had the minimal competence to evaluate the voluminous discovery materials relating to the DNA

matches and to address that evidence at trial, but whether there is evidence in the record supporting the trial court's decision that he did not. *See* ***Imani***, 326 Wis. 2d 179, ¶37 (appellate review of the trial court's competency finding "is limited to whether the [trial] court's determination is 'totally unsupported by the facts apparent in the record'") (citation omitted). Our review of the record reveals that it supports the trial court's conclusion.

¶33 The record shows that Washington's behavior leading up to his request to proceed *pro se* on the eve of trial was irrational and disruptive. In his written request to proceed *pro se*, Washington mentions a complaint he filed with the Department of Justice, the Director of State Courts, and the clerks of the circuit court and court of appeals, in which he asks that charges be brought against the trial court, the prosecutor, and defense counsel "for fabricating two John Doe arrest warrants and a complaint on the dates of Feb. 14, 2008 and March 3, 2008." Washington maintained throughout the trial court proceedings that the original arrest warrant did not bear a court seal, that the John Doe warrant that the prosecutor produced in 2008 was a forgery, and that he was the victim of an elaborate plot between defense counsel, the State, and the trial court.

¶34 Defense counsel did not share in Washington's belief that the warrant lacked a court seal, and informed the court that Washington's fixation on his fabrication theory left Washington unable "to get beyond the motion issues and deal with the case itself and how to proceed with the trial and discuss the strategy." In fact, Washington's obsession with a conspiracy theory led to frequent disruptions in the courtroom, during which Washington interrupted and stalled proceedings, and in some instances refused to participate in proceedings or even physically come to court.

¶35 Such irrational and obsessive behavior led defense counsel to question Washington's competency to stand trial. And while, after an evaluation, it was ultimately determined that Washington was competent to stand trial, the trial court could reasonably and rationally rely on that behavior to conclude that Washington was not competent to represent himself. His inability to recognize and follow proper courtroom decorum or to identify and argue legitimate legal issues in his own defense, made it logical to conclude that Washington would not be able to properly focus on and understand the complicated DNA evidence that was critical to the State's case. *See* ***State v. Marquardt***, 2005 WI 157, ¶61, 286 Wis. 2d 204, 705 N.W.2d 878 ("the record must demonstrate an identifiable problem or disability that may prevent a defendant from making a meaningful defense"). As such, the trial court did not erroneously exercise its discretion when it denied Washington's motion to proceed *pro se*.

III. The trial court properly denied Washington's request for a new lawyer.

¶36 Finally, Washington argues that the trial court erred when it denied his request for new counsel after the court denied his request to proceed *pro se*. Again, we disagree.

¶37 While Washington is correct in his assertion that indigent defendants are guaranteed the right to appointed counsel, "this guarantee does not include the right to the particular attorney of the defendant's choosing." *See* ***State v. Darby***, 2009 WI App 50, ¶28, 317 Wis. 2d 478, 766 N.W.2d 770. Whether to grant a defendant's request for new counsel is a matter within the trial court's discretion. ***Id.*** We must uphold that "discretionary decision if the [trial] court logically interpreted the facts, applied the proper legal standard to the relevant facts, and

used a rational process to reach a reasonable conclusion." ***Id.*** Having reviewed the record, we conclude that the trial court properly exercised its discretion here.

¶38 Washington complains that the trial court denied his request for a third attorney "based solely on [the] timing" of his request and contends that the breakdown in communication between himself and his lawyer went far beyond mere disagreement over strategy. The record belies his contention.

¶39 The record shows that the primary problem between Washington and his attorney was strategy, in particular, his attorney's refusal to pursue Washington's claim that the John Doe arrest warrant did not bear the court seal and that the warrant in the file bearing the seal was a forgery. We agree with the State that the record shows that had the trial court appointed a new lawyer, the same scenario undoubtedly would have ensued. The trial court had already addressed Washington's concerns about the seal, but Washington refused to let the issue go, allegedly believing the court to be part of a conspiracy against him. Washington's compulsive unwillingness to drop the warrant issue and discuss anything else about the case makes it clear that he was unlikely to accept anyone appointed to represent him.

¶40 Furthermore, the trial court properly took into consideration whether granting Washington's request for new counsel would unnecessarily delay the administration of justice. *See, e.g.,* ***State v. Jones***, 2007 WI App 248, ¶13, 306 Wis. 2d 340, 742 N.W.2d 341. The crimes in this case had been committed over twenty years earlier and Washington's request came on the eve of trial. Because there was simply no indication that Washington would be any happier with new counsel than he had been with his two prior lawyers, it was reasonable and rational for the trial court to conclude that granting Washington's request

would be an unnecessary delay in the resolution of this case. As such, we affirm the trial court's decision to deny Washington's request for a new attorney.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.