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June 4, 2018

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You are hereby notified that the Court has entered the following order:

2017AP1519-CR	State of Wisconsin v. Brian A. Ashley (L.C. # 2013CF5123)
2017AP1520-CR	State of Wisconsin v. Brian A. Ashley (L.C. # 2015CF3465)
2017AP1521-CR	State of Wisconsin v. Brian A. Ashley (L.C. # 2015CF3473)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated appeals, Brian A. Ashley appeals from judgments of conviction for five counts of failing to pay child support for 120 days and one count of bail jumping, contrary to WIS. STAT. §§ 948.22(2) and 946.49(1)(b) (2010-11; 2011-12; 2013-14; 2015-16), and from an

order denying his postconviction motion.¹ A jury found Ashley guilty of those crimes in January 2016, and he was sentenced in March 2016. At issue on appeal is whether the trial court erred in early 2015—nearly a year before the jury trial—when it asked Ashley about his desire to represent himself and ultimately ordered a competency evaluation based on Ashley’s answers to the trial court’s questions.² We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgments and the order.

In November 2013, Ashley was charged with four counts of failure to pay child support for 120 days. Over the next fourteen months, two attorneys appointed to represent Ashley withdrew at his request. On January 30, 2015, Ashley’s third attorney filed a motion to withdraw, indicating that Ashley wished to represent himself. That same day, the trial court conducted a hearing on the motion.³

At the hearing—which is discussed at length in the parties’ briefs and in the order denying Ashley’s postconviction motion—trial counsel told the trial court that there were “communication problems” and that “justice will be served” if counsel were permitted to withdraw. Trial counsel said the issue would then be whether Ashley could represent himself.

¹ The trial court issued an identical order denying the single postconviction motion that was filed in the three joined cases.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Notably, Ashley does not challenge anything that happened in his cases after February 17, 2015.

The trial court addressed Ashley directly, asking: “[W]hat is your position, Mr. Ashley?”

Ashley answered:

If at any time the [c]ourt felt that my intention is to cooperate, it was never my intent, nor did I have plans to amend. I’ll be representing myself on factual and natural law.

And before we proceed, has anyone been hurt, harmed, or property been infringed on in this matter?

The trial court responded: “That’s not even a question I’m considering at this point,” and it asked Ashley about the reasons he wished to have trial counsel withdraw. Ashley said that he had a “[c]onflict of interest” with trial counsel and indicated that he planned to represent himself.

The trial court asked the State for its position. The State questioned whether Ashley had the ability to represent himself. The State also said that if trial counsel were permitted to withdraw, the case would be unnecessarily delayed. In response, trial counsel reiterated that he and Ashley did not communicate or cooperate well, and he suggested that the public defender would likely be willing to appoint new counsel.

The trial court again addressed Ashley directly, which led to the following exchange between Ashley, the trial court, and trial counsel:

THE COURT: Why do you think you can represent yourself, Mr. Ashley?

[ASHLEY]: (No response.)

³ The Honorable William W. Brash, III, presided over the January 30, 2015 and February 17, 2015 court hearings.

THE COURT: I asked you why you thought you could represent yourself?

[ASHLEY]: I will be representing myself on factual and natural law. Before we proceed, I would like to know if anyone [has] been hurt or harmed or if property [has] been infringed upon in this matter?

THE COURT: I'm starting to have a question as to competency.

[TRIAL COUNSEL]: So am I, Judge. I'm asking to withdraw, but a competency evaluation may be in order.

THE COURT: I think it's appropriate at this point in time, so I will order remand and order him evaluated at this point.

Trial counsel urged the trial court to allow Ashley to remain free on bail while the competency evaluation was completed, noting that Ashley had not missed any court appearances. In response, the State asserted that Ashley was "deliberately stonewalling the attorneys and the [c]ourt in order to frustrate the process of this case." The State also argued that Ashley was a flight risk. The trial court observed that Ashley "seems single-minded in his approach today" and "doesn't seem to be with us today." The trial court said that it would remand Ashley so that the evaluation could be conducted.

On February 17, 2015, the parties returned to court to discuss the competency evaluation. In the written report, the psychiatrist who examined Ashley opined that he was competent both to proceed and to represent himself. Ashley and trial counsel indicated that they did not contest the opinion. The trial court found Ashley competent to proceed. The trial court then asked the parties about next steps in the case. Trial counsel responded: "Judge, last time we were here there was an issue whether I would stay on as Mr. Ashley's counsel. He wants me to stay on, and I'm prepared to do so." The trial court confirmed with Ashley that he wanted trial counsel to

continue to represent him. Ashley indicated that he would like to continue to be represented by trial counsel as long as they had sufficient time to work together. The trial court responded: “[A]ssuming that you have that time, the ability to communicate with [trial counsel] and go forward, is it your desire to have him continue to represent you with regards [to] this matter?” Ashley answered: “Yes. Yes, Your Honor.” The trial court scheduled future dates and reinstated Ashley’s bail.

In the eleven months that followed, additional charges were issued against Ashley, and he ultimately had a single trial for the charges in three different criminal cases. The jury found him guilty of all charges. The trial court imposed prison sentences on all six counts, some of which were consecutive and some of which were concurrent.⁴

Represented by postconviction counsel, Ashley filed a postconviction motion seeking a new trial. Ashley asserted that the way the trial court addressed his January 30, 2015 request to represent himself violated his constitutional rights to due process and self-representation. First, Ashley argued that the trial court improperly refused to accept Ashley’s statements that he would be representing himself and improperly asked Ashley why he was dissatisfied with his attorney. Second, Ashley argued that he was, in fact, capable of representing himself. Finally, Ashley asserted that the trial court’s decision to remand Ashley for the competency evaluation “was an attempt by the trial court to prevent [him] from exercising his constitution[al] rights.” Notably, the motion did not acknowledge or discuss the fact that on February 17, 2015, Ashley and his trial counsel told the trial court that Ashley had decided to proceed with counsel.

⁴ The Honorable Mark A. Sanders presided over the jury trial and sentenced Ashley.

The trial court denied the motion in a written order.⁵ The trial court, citing *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), identified the issues that must be considered during a colloquy with a defendant who seeks to represent himself. The trial court then analyzed the actions taken by the judge who presided over the proceedings on January 30, 2015, and February 17, 2015, stating:

[T]he record reflects that the court made two attempts at the January 30, 2015 hearing to engage the defendant in a colloquy, and that his responses caused the court to question his competency. The defendant does not challenge the court's decision to order a competency evaluation. He argues that instead of addressing the knowing and voluntary nature of his request to proceed without counsel, the court chose to address the reasons for his request and the reasons for his dissatisfaction with his attorney, which he asserts was immaterial. Implicit in the defendant's argument is a suggestion that if the court had asked the "right" questions, he would not have made statements which caused the court to question his competency. The court rejects this argument, as *Klessig* does not ... dictate the manner in which to conduct the colloquy. The defendant's responses to the court's questions regarding his desire to proceed *pro se* were non-responsive or nonsensical, which raised a legitimate question about his competency to stand trial. A defendant who is not competent to stand trial is not competent to represent himself, and therefore, the court perceives no violation of constitutional rights at the January 30, 2015 proceeding.

Although [the psychiatrist who conducted the competency evaluation] stated that the defendant was competent to stand trial and to represent himself, [his] opinions were not binding on the court. In any case, on February 17, 2015, the defendant told the court that he understood [the psychiatrist's] findings that he was competent both to stand trial *and* to represent himself; however, he stated that he wanted to proceed *with* counsel. Based upon the defendant's representations, the court had no reason to revisit his prior request to proceed without counsel.

⁵ The Honorable T. Christopher Dee denied the postconviction motion.

The trial court also explicitly “reject[ed] the defendant’s suggestion that he was remanded into custody on January 30, 2015 in an attempt to get him to relinquish his desire to assert his constitutional right to self-representation.” The trial court called Ashley’s assertion “wildly speculative and insulting to the integrity of the court.”

On appeal, Ashley argues that the trial court “erroneously denied” his “demand to represent himself at the trial” and asserts that he “was capable of representing himself in this case.” (Bolding and some capitalization omitted.) He contends that the trial court failed to follow the procedure established in *Klessig*. Finally, Ashley continues to suggest that the trial court had Ashley taken into custody “to cause him to relinquish his demand to represent himself.”

We are not persuaded by Ashley’s arguments, and we agree with the analysis in the postconviction order. When trial counsel informed the trial court that Ashley wanted trial counsel to withdraw so Ashley could represent himself, the trial court asked Ashley questions concerning both of those decisions. We do not discern that any of the trial court’s questions violated the procedures outlined in *Klessig*. Moreover, it is well-established that a trial court must conduct competency proceedings if there is “reason to doubt” the defendant’s competency based upon “the defendant’s demeanor in the courtroom, colloquies with the court, or ... a motion from either party.” See *State v. Byrge*, 2000 WI 101, ¶29, 237 Wis. 2d 197, 614 N.W.2d 477; see also WIS. STAT. § 971.14(1r)(a). In this case, Ashley’s answers gave the trial court (and trial counsel) “reason to doubt” Ashley’s mental capacity. See *Byrge*, 237 Wis. 2d 197, ¶29. Neither Ashley’s postconviction motion nor his opening brief on appeal challenged the trial court’s decision to order a competency examination—an examination that trial counsel agreed “may be

in order.”⁶ Ashley has also not provided any authority for the proposition that the trial court was required to continue the *Klessig* analysis after it determined that a competency examination was needed.

When Ashley returned to court after the competency evaluation, the trial court found him competent to proceed. At that point, Ashley could have pursued self-representation. Instead, both he and trial counsel explicitly told the trial court that he had decided to proceed with trial counsel representing him. We fail to see how the trial court erred in honoring Ashley’s decision to abandon his request to proceed *pro se*. Further, whether Ashley was competent to represent himself—a claim Ashley makes on appeal—was an issue the trial court ultimately did not reach due to Ashley’s decision to have trial counsel continue to represent him.

Finally, we briefly address Ashley’s bald assertion that the trial court remanded him in order to persuade him to “relinquish[] his desire to assert his constitutional right to self-representation.” We are not persuaded that the hearing transcripts support this assertion. The trial court heard argument from both parties concerning whether to remand Ashley for the competency examination and then made its decision. Ashley has not demonstrated that the trial

⁶ In his reply brief, Ashley responds to the State’s assertion that the trial court correctly doubted Ashley’s competence. Ashley implies that his beliefs about the law should not have been a basis to doubt his competency. To the extent Ashley is attempting to challenge the trial court’s decision to order a competency evaluation, his argument fails not only because it is raised for the first time on appeal and in his reply brief, but also because he has not adequately addressed the fact that his answers to the trial court’s questions were non-responsive and repetitive and his own counsel suggested a competency evaluation was in order. *See Northbrook Wis., LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851 (“Arguments raised for the first time on appeal are generally deemed forfeited.”); *Techworks, LLC v. Wille*, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727 (court will not consider issues raised for the first time in reply brief); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court will not address inadequately briefed issues).

court's decision was an erroneous exercise of discretion. Further, at the next hearing, the trial court found Ashley competent and asked how he wanted to proceed. When Ashley indicated he wanted to proceed with counsel, the trial court asked him about his decision and confirmed his wishes. Nothing in the transcripts of either hearing indicates that the trial court was attempting to infringe on Ashley's constitutional rights.

For the foregoing reasons, we conclude that Ashley has not shown that the trial court erred in its handling of his January 2015 request to proceed *pro se*. Ashley is not entitled to a new trial. We summarily affirm the judgments and the order denying Ashley's postconviction motion.

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals