COURT OF APPEALS OF WISCONSIN
DISTRICT I

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT;

V.

APPEAL NO. 2013AP002859-CR
APPEAL NO. 2013AP002860-CR

ANDREW L. JACKSON,
DEFENDANT-APPELLANT.

APPEAL FROM A NON-FINAL ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HON. MEL FLANAGAN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

ZELL LAW OFFICE, LLC
ATTORNEY MICHAEL D. ZELL
Attorney for Defendant-Appellant
STATE BAR NO. 1031931
1547 Strongs Avenue, Suite C
Stevens Point, WI 54481
michael@michaeldzell.com
(715) 952-5030 phone
(888) 371-6639 fax

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Plea withdrawal is warranted because the Court refused to allow Jackson to represent himself due to the complexity of the case, an improper and insufficient reason.

Both the State and the circuit court relied on the fact that the case was a "complex" matter and Jackson's asserted unpreparedness as the basis to deny his waiver of counsel. But the complexity of the case and Jackson's level of preparedness do not factor into the issues the Court must assess when deciding whether a defendant should be allowed to represent himself. The circuit court and the state make the same error, which is conflating the standard for competency to represent oneself with the waiver of the right to counsel. The U.S. Supreme Court's has made this pertinent observation:

> [T]he concept of competency to represent oneself at trial does not include possessing or lacking technical legal knowledge. "[T]he competence that is required… to waive [the] right to counsel is the competence to waive the right, not the competence to represent [themselves]. ***Godinez v. Moran***, 509 U.S. 389, 399.

Jackson recognizes the tension between the right of a criminal defendant to have the assistance of counsel, and the right of a criminal defendant to represent himself. ***See State v. Imani***, 2010 WI 66, ¶ 20, 326 Wis.2d 179, 786 N.W.2d 40 (citing ***Faretta v. California***, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), and ***State v. Klessig***, 211 Wis.2d 194, 564 N.W.2d 716 (1997)).

Jackson and the State agree that the analysis favors representation by counsel unless there is a clear waiver of the right to counsel. Specifically, the parties agree that "nonwaiver is presumed." (State's brief, 10)(citing ***Imani***, at ¶ 22). Yet this does not end the analysis. The parties agree that a defendant must be allowed to proceed *pro se* when he voluntarily waives the right to counsel and is competent to proceed pro se. (State's brief, 10)(citing ***Imani***, ¶ 21).

Finally, the parties also agree that improper denial of the right to self-representation is a structural error subject to automatic reversal. (State's brief, 11)(citing ***Imani***, at ¶ 21).

ISSUE 1: The Circuit Court is not allowed to determine non-waiver based on an assessment that the defendant is "unprepared" to conduct the "complex" trial proceedings.

Criminal defendants who waive the right to counsel and are competent to represent themselves have the right to do so. Two conditions must be met for a defendant to exercise the right to self-representation: (1) knowing, intelligent, and voluntary waiver, and (2) competence to proceed *pro se*. ***Imani***, at ¶21 (citations omitted).

A valid waiver of the right to counsel requires the circuit court to scrutinize the defendant's request by use of a colloquy. In ***State v. Klessig***, the Wisconsin supreme court established a mandatory colloquy for use by

circuit courts to establish a defendant's valid waiver of counsel. ***Klessig***, 211 Wis.2d at 206. The four factors of the Klessig test require the circuit court to consider whether:

> 1. The defendant 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.
> 4. Was aware of the general range of penalties that could be imposed on him.
>
> ***Imani***, ¶ 23. (quoting ***Klessig***, 211 Wis.2d at 206).

The parties agree that the full colloquy is not needed when assessing whether the circuit court's denial of a defendant's waiver of counsel is valid. As the supreme court pointed out in ***Imani***, if any of the four factors is decided against the defendant, the circuit court's denial of the defendant's waiver of counsel is valid. ***Imani***, at ¶ 26.

Jackson concedes that his case fits the ***Imani*** side of the analytical framework, and thus the circuit court was not required to conduct a complete ***Klessig*** colloquy. According to ***Imani***, if waiver should be denied on *any* of the four factors presented by the colloquy, it is unnecessary to conduct a full colloquy.

The problem is that the circuit court did not conduct a colloquy on any of these factors. The Court's decision to deny counsel during the trial proceedings focused on Jackson's lack of preparedness for a motion hearing. This does not fit the ***Klessig*** factors in any way, and is an improper reason to deny Jackson's waiver of counsel.

After the postconviction motion was filed, the Court issued a written decision denying the motion and changed it's reasons for denying Jackson's request to the asserted "episodic driven" nature of the request. (42A:2). According to the Court, the decision was "episodic driven" as Jackson was motivated by impulsive decision making rather than a deliberate choice to represent himself. (42A:2). This would fit the first ***Klessig*** factor, though Jackson does not agree that his decision was impulsive, as he made the request numerous times.

In it's response brief, the State now characterizes the circuit court's decision as recognition of Jackson's failure to understand the consequences of self-representation. The State cites a paragraph from ***Brooks*** to show that a defendant who cannot understand the risks of proceeding without counsel has not waived the right to be represented by counsel. (State's brief, 12). According to the State, Jackson's complaints about access to legal materials and service of process are equivalent to an admission that he did not understand the consequences of self-representation. Jackson does not agree. Not only did Jackson express his understanding of those hardships, he expressed a willingness to proceed to trial *pro se* despite the hardships.

The big problem is that the circuit court never conducted a colloquy on any of the ***Klessig*** issues. The State is now fishing for sufficient language to support denial of waiver based on the ***Klessig/Imani*** analysis. But the Court

never conducted a ***Klessig/Imani*** analysis, and instead relied on Jackson's lack of "preparation."

Whether Jackson was prepared for trial is not a ***Klessig*** factor. While the Court may have advised Jackson of some of the disadvantages of proceeding to trial without counsel, he expressed understanding and a wish to proceed without counsel. This is a valid waiver of the right to counsel. Jackson's decision was not "episodic driven" meaning lacking the deliberate choice required for a valid waiver. Jackson asked at multiple hearings over several months to be allowed to waive the right to counsel.

ISSUE 2: States may only impose their own higher standard regarding competence when there is "severe mental illness."

Jackson concedes that defendant competent to stand trial may not be competent to represent himself. Wisconsin's standard allows courts to deny defendant's the right to represent themselves for reasons of "education, literacy, language fluency, and any physical or psychological disability." ***Imani***, at ¶ 37 (Citing State v. Pickens, 96 Wis.2d 549, 569, 292 N.W.2d 601 (1980). But a recent U.S. Supreme Court decision has changed the landscape. ***Indiana v. Edwards*** only allows a higher standard when the defendant suffers from a "severe mental illness." 554 U.S. 164, 179, 128 S.Ct.2379, 171 L.Ed.2d 345 (2008).

The State asserts that federal constitutional law allows states to have a higher standard for a defendant's competence to represent one's self at trial than the federal standard. This is a misguided reading of one paragraph of ***Edwards.*** In Edwards, the defendant specifically requested that he be allowed to represent himself at trial, arguing that his mental competence to stand trial was all that could be required to also find that he was also competent to represent himself. ***Edwards***, 554 U.S. at 168-9. Edwards argued that ***Farretta v. California***, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562, required that he be found competent to represent himself if he was merely competent to stand trial. ***Id***. Though the Indiana Supreme Court agreed with Edwards, the U.S. Supreme Court did not.

The ***Edwards*** Court provided a very narrow exception, ***severe mental illness***, as the only allowable limitation for not finding competence to represent oneself when the defendant is mentally competent to stand trial:

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under ***Dusky*** but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. ***Edwards***, 554 U.S. 164, at 177-178).

Wisconsin's current standard allows a circuit court to consider literacy, fluency, physical disability, and other things in deciding whether a defendant is competent to represent himself. Edwards does not allow the State to limit a defendant's right to represent himself for lack of competency except when

there is a showing of "severe mental illness." Wisconsin's rule, expressed in ***Klessig***, ***Pickens***, and ***Imani***, is unconstitutional under the U.S. and State Constitutions.

The State's reliance on ***Brooks v. McCaughtry***, 380 F.3d 1009, a seventh circuit decision, is inapposite for two related reasons. First, the ***Brooks*** decision predates ***Edwards***. Brooks' argument was that competency to stand trial equaled competency to represent oneself at trial, based on the then-recent U.S. Supreme Court decision in ***Godinez v. Moran***. ***Godinez*** involved a defendant's request to represent himself for a plea hearing, not a trial. In those circumstances, the U.S. Supreme Court ruled that competency to stand trial requires a defendant be allowed to waive counsel so that he may plead guilty. ***Edwards*** is now controlling law on the issue of a defendant's competency to represent oneself at trial, and only permits the additional consideration of severe mental illness if a defendant wishes to represent himself at trial rather than at a plea.

This means the ***Brooks*** court was wrong about the Wisconsin standard. The ***Brooks*** court specifically admitted that they may be wrong on the constitutionality of Wisconsin's standard and therefore decided the issue on a much narrower basis. After ruling that Wisconsin's standard is constitutional (based on **Godinez**, not ***Edwards***), the court admitted:

> ***We may be wrong***, but if so Brooks still must lose. Remember that a state court's decision can be struck down in a federal habeas corpus proceeding only if it is contrary to "clearly established" federal law as declared by the Supreme Court. Godinez did not clearly establish a rule, which is the rule for which Brook contends, that a defendant found competent to stand trial

> is automatically entitled to represent himself no matter how deficient his understanding of the consequences of going to trial without a lawyer. ***Brooks***, at ¶ 10. (emphasis supplied)

So the Brooks court relied on the intricacies of Federal Habeas law rather than a firm commitment to the constitutionality of Wisconsin's standard.

There is no evidence that Jackson was suffering from severe mental illness at the time he made the request to represent himself. The court never conducted an inquiry to determine Jackson's level of intelligence or ability to represent himself. The circuit court's only assessment in this regard was to decide that Jackson was not competent to represent himself because he was not prepared enough for a motion or for the trial, and because the cases were "complex." (42A:2). Regardless, the Wisconsin standard for assessing competency to represent oneself is unconstitutional after ***Edwards***.

CONCLUSION

For the reasons stated, Andrew Jackson respectfully requests that the Court of Appeals find that the circuit court erred and improperly denied his right to self-representation, warranting reversal of the conviction and reinstatement of the proceedings at the point the request was improperly denied.

Dated this November 26, 2014

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Michael D. Zell

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CERTIFICATION OF BRIEF AND APPENDIX

I hereby certify that this brief conforms to the rules contained in **Wis. Stat. §809.19(8)(b) and (c)** for a brief and appendix produced with a proportional serif font. The length of this brief is 2378 words, and 11 pages.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify pursuant to **Wis. Stat. § 809.19 (12)(f)**, I have filed an electronic copy of this brief, excluding the appendix, if any, and that the text of the electronic copy and the text of the paper copy of the brief are identical.

A copy of all of these certificates is part of both the paper and electronic copies of the brief, and has been served on the court and all parties.

Dated this November 26, 2014

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Michael D. Zell
Attorney At Law