STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP522-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ENNIS LEE BROWN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
DAVID BOROWSKI, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. Brown was not denied his constitutional right to a speedy trial.

An inquiry into the possible denial of a criminal defendant's constitutional right to a speedy trial may be triggered by a delay between his arrest and his trial that approaches a year in length. *State v. Urdahl*, 2005 WI App 191, ¶¶ 12, 15, 286 Wis. 2d 476, 704 N.W.2d 324.

In this case, there was a delay of about fourteen and one-half months, i.e., 438 days, between the time the defendant-appellant, Ennis Lee Brown, was arrested on or about July 26, 2012, and the time his trial started on October 7, 2013 (112), triggering the inquiry.

The next step in the process is determining who caused the delay. *State v. Williams*, 2004 WI App 56, ¶¶ 33-34, 270 Wis. 2d 761, 677 N.W.2d 691. Delay attributable to the state is counted in determining whether a speedy trial has been denied. *Williams*, 270 Wis. 2d 761, ¶ 34. Delay attributable to the defendant or to the ordinary demands of the judicial system is not counted in making this determination. *Williams*, 270 Wis. 2d 761, ¶¶ 34, 36.

Brown made his initial appearance on July 31, 2012 (94). Because of an intervening weekend and the need to draft a criminal complaint following a warrantless arrest (2), the initial appearance within three working days after Brown's arrest would appear to be within the "reasonable time" required by Wis. Stat. § 970.01(1) (2013-14), and should therefore be attributed to the ordinary demands of the judicial system.

Therefore, the five calendar days between Brown's arrest and initial appearance should not be counted in determining

whether a speedy trial was denied, reducing the period of chargeable delay to 433 days.

The preliminary hearing was commenced August 10, 2012, within ten days after the arraignment, as required by Wis. Stat. § 970.03(2) (2013-14). This period should also be attributed to the ordinary demands of the judicial system.

Therefore, the ten days between Brown's initial appearance and the commencement of the preliminary hearing should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 423 days.

The preliminary hearing had to be adjourned until August 24, 2012, because of the unavailability of some witnesses (95; 96:39-41; 97). The unavailability of witnesses is an intrinsic reason for delay so that the period of delay caused by their unavailability is not counted in determining whether a speedy trial was denied. *Urdahl*, 286 Wis. 2d 476. ¶ 26.

Therefore, the fourteen days the preliminary hearing was adjourned reduces the period of chargeable delay to 409 days.

Brown was arraigned on September 5, 2012 (98), well within the thirty days allowed for the filing of an information and an arraignment on that information. Wis. Stats. §§ 971.01(2), 971.05(3) (2013-14). This period should also be attributed to the ordinary demands of the judicial system.

Therefore, the twelve days between Brown's preliminary hearing and arraignment should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 397 days.

At the arraignment, the trial was scheduled for December 5, 2012, which would have provided Brown a very speedy trial a little more than four months after his arrest (98:6).

Ordinarily, the entire ninety-one days between the arraignment and the scheduled trial date would be attributed to the ordinary demands of the judicial system, and therefore not counted in determining whether a speedy trial was denied. However, Brown's attorney, Michael Hicks, was suspended from the practice of law, and therefore not able to represent Brown, from September 27, 2012, to October 16, 2012 (108:25, 28).

Any period in which the defendant is not represented by counsel through no fault of his own may be charged against the state if the gap resulted from the failure to appoint replacement counsel with dispatch or from a systematic breakdown in the public defender system. *Vermont v. Brillon*, 556 U.S. 81, 85 (2009).

But here, the public defender's office followed established procedures. When the public defender's office finds out that an appointed attorney has been suspended it determines whether the reason for the suspension is something that signals unfitness to practice or is simply some sort of noncompliance with some order or rule (108:33-34). The office then determines whether the lawyer is going to be unable to continue his representation or whether he will be able to resume his representation in a timely way (108:36-37). If the suspension is caused by noncompliance that can be remedied quickly, the public defender does not invoke the formal process that would be necessary to replace the attorney (108:34, 37).

In this case the public defender determined that there was no reason to appoint a different attorney for Brown because counsel remedied the compliance problem that got him

suspended, the temporary suspension was therefore brief, and counsel was already reinstated by the time any action could be taken (108:28-31, 39).

Therefore, none of the ninety-one days between the arraignment and the scheduled trial date should be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 306 days.

As of the final pretrial conference on November 30, 2012, the state was ready to proceed to trial on the scheduled December date (99:3-4, 9). But Brown's attorney asked for a last minute continuance, stating that he was not ready to proceed because of the complexity of the case (99:4-8). At counsel's request, the trial was rescheduled for May 5, 2013 (99:16).

Ordinarily, the entire 151 days of delay between the original trial date and the adjourned trial date would be attributed to the defendant. Despite Brown's personal objection to the continuance (99:15-16), a delay requested by the defendant's attorney, whether counsel is retained or appointed, is charged against the defense. *Brillon*, 556 U.S. at 90-93; *Urdahl*, 286 Wis. 2d 476, ¶ 29. *See State v. Wilkens*, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990) (tactical waiver by counsel binding on defendant). Even when appointed by the state, a lawyer who has undertaken representation of the defendant acts on behalf of the defendant, not the state, and is therefore not a state actor for the purpose of attributing delay. *Brillon*, 556 U.S. at 91-92.

But again the arithmetic is complicated by the fact that Brown's attorney, Hicks, was temporarily suspended during the period of the continuance from February 12, 2013, to March 11, 2013 (108:28). But again the public defender did not remove counsel from Brown's case because it determined that counsel would be able to promptly resolve his problem with

the Office of Lawyer Regulation and resume his representation, which he obviously did (108:32, 39).

Therefore, none of the 151 days between the original trial date and the adjourned trial date should be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 155 days.

At a status hearing held March 29, 2013, Brown indicated that he no longer wanted his current attorney, Hicks, to continue representing him (100:3-4). So the court allowed counsel to withdraw and directed the public defender to appoint a new attorney (100:7).

The new attorney, Michael Plaisted, made his first appearance on April 15, 2013 (101:2). Because new counsel could not be ready to try the case in three weeks, the trial was rescheduled to June 24, 2013 (101:3).

The delay caused by the defendant's dismissal of his attorney and the need to appoint a new one is attributed to the defendant. *Brillon*, 556 U.S. at 93-94. So the delay of fifty days between the first adjourned trial date and the second adjourned trial date should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 105 days.

Plaisted moved to withdraw because Brown wanted him to file frivolous motions (102:2, 5). Brown said that Plaisted could remain his attorney as long as Plaisted filed the motions he wanted Plaisted to file (102:4). But since Plaisted refused to file Brown's motions, Brown was in effect concurring in Plaisted's withdrawal as his attorney, as recognized by the circuit court (103:5).

However, Plaisted's withdrawal did not in and of itself necessitate any extension of the trial date, which remained set at June 24, 2013. Thus, Plaisted's withdrawal is not relevant in assessing responsibility for any delay.

At a status hearing on June 14, 2013, Brown asked to dismiss his next attorney, Nathan Opland-Dobs, and be allowed to represent himself (103:3). However, Brown was acting erratically so the court ordered a competency evaluation (103:14). The trial date was vacated, and the case was adjourned to June 28, 2013, for a competency hearing (103:16).

The delay of four days between the rescheduled trial date and the date of the competency hearing is attributed to the defendant because of his aggressive and disruptive behavior. *See Brillon*, 556 U.S. at 93-94. So this delay should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to 101 days.

At the competency hearing Brown was disruptive again and had to be removed from the courtroom (104:3-5). The case was adjourned to July 15, 2013, for another status hearing (104:6).

The delay of seventeen days between the competency hearing and next status hearing, caused by Brown's disruptive behavior, should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to eighty-four days.

At the hearing on July 15, 2013, Brown again insisted on representing himself (105:3). The circuit court acceded to Brown's demand at another hearing two days later (106:4). The trial was then set for October 7, 2013, when it finally commenced (106:8; 112).

The delay of eighty-four days between the hearing where Brown asked to proceed pro se and the date the trial started is attributable to Brown, and should not be counted in determining whether a speedy trial was denied, reducing the period of chargeable delay to zero.

Because none of the delay of Brown's trial can be attributed to the state, and because most of the delay must actually be attributed to Brown and his antics, there is no need to inquire into any other factors to assess whether there was a prejudicial delay of the trial. *Williams*, 270 Wis. 2d 761, ¶ 41. *See United States v. Ellis*, 622 F.3d 784, 791 (7th Cir. 2010) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)).

Indeed, even if nothing more than the 151 days of delay caused by the continuance expressly requested by Brown's counsel is considered, and even if the intervening month's suspension of counsel is deducted from this 151 days, leaving 121 days of delay attributable to the defense request, the period of chargeable delay drops to 317 days, significantly below the threshold of one year necessary to presume prejudice from the delay of a trial. *See Williams*, 270 Wis. 2d 761, ¶ 41.

Brown was not denied his constitutional right to a speedy trial.[1]

[1] Not that it actually matters since Brown's claim that he was denied a speedy trial is plainly untenable on the merits anyway, but as a footnote, Brown waived any right to argue on appeal that the "trial court had erred in denying Defendant's Motion to Dismiss Violation of a Right to a Speedy Trial," Brief for Defendant-Appellant at 44, by disavowing this motion, which had been filed by his standby attorney while he was representing himself (110:5; 111:6).

II. There is no reason to believe that Brown was not competent to exercise his constitutional right to represent himself at the start of his trial, although he forfeited that right by his misconduct after the trial commenced.

When a defendant who has a constitutional right to be represented by counsel wants to waive that right and invoke his competing constitutional right to represent himself, the circuit court must determine whether the defendant has knowingly, voluntarily and intelligently made the choice to represent himself and whether he is competent to proceed pro se. *State v. Marquardt*, 2005 WI 157, ¶ 56, 286 Wis. 2d 204, 705 N.W.2d 878.

Since persons of average intelligence and ability may be competent to represent themselves, and since technical legal knowledge is not required, the defendant's choice should ordinarily be honored unless there is an identifiable problem or disability that may prevent the defendant from making a meaningful defense. *Marquardt*, 286 Wis. 2d 204, ¶ 61; *State v. Ruszkiewicz*, 2000 WI App 125, ¶ 35, 237 Wis. 2d 441, 613 N.W.2d 893.

The issue on appeal when the defendant complains that the circuit court committed reversible error by honoring his choice is whether the record demonstrates an identifiable problem or disability that may have prevented the defendant from making a meaningful defense. *Dane County Dept. of Human Serv. v. Susan P.S.*, 2006 WI App 100, ¶ 23, 293 Wis. 2d 279, 715 N.W.2d 692. The circuit court's competency determination will be upheld on appeal unless it is totally unsupported by the facts in the record. *Ruszkiewicz*, 237 Wis. 2d 441, ¶ 38.

Brown attempts to identify his unruly, disruptive behavior as a problem that prevented him from making a meaningful defense. Brief for Defendant-Appellant at 46-47.

But although a court may terminate self-representation by a defendant who deliberately engages in seriously obstructive misconduct at the trial, *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975); *State v. Haste*, 175 Wis. 2d 1, 25-26, 500 N.W.2d 678 (Ct. App. 1993), disruptive behavior prior to trial does not disqualify a defendant from representing himself at a trial he does not attempt to disrupt.

A defendant whose pretrial disruptive behavior was deliberate and intentional can decide that this kind of behavior is useless and even counterproductive at a trial, and can choose to behave himself in front of the jury to make the best impression he can to convince the jury to accept his defense. If the defendant makes the choice not to disrupt the trial, there is no reason to find that he is not competent to represent himself because of disruptive behavior that does not occur.

In *Faretta*, the Supreme Court was warned that many defendants representing themselves might deliberately disrupt their trials. *Faretta*, 422 U.S. at 834 n.46. But the Court indicated that this possibility would not prevent a defendant from exercising his traditional right to represent himself at the start of his trial, but could only result in a forfeiture of self-representation if he actually engaged in disruptive conduct during the trial. *See Faretta*, 422 U.S. at 834 n.46.

Therefore, prior deliberate and intentional disruptive conduct is not an identifiable problem or disability that may prevent the defendant from making a meaningful defense so as to disqualify the defendant from representing himself at the trial as long as the disruptive behavior is not repeated at the trial.

However, in *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008), the United States Supreme Court concluded that

> the 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* [*v. United States*, 362 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves.

So if a defendant's disruptive behavior is not deliberate and intentional, but the manifestation of a mental illness that compels him to misbehave, it may be a disability that prevents him from making a meaningful defense and representing himself.

In this case, though, two mental competency examinations failed to discover any signs of actual mental illness that would prevent Brown from representing himself (18:3-4; 29:2-4). The second examination specifically included an assessment of Brown's disruptive behavior, and found that it was deliberate and intentional, and could not be linked to symptomatic mental illness (29:3-4; 111:4).

The circuit court observed itself at the trial that Brown's renewed disruption was intentional manipulative misbehavior (116:24; 117:73-75). The court found that Brown's outlandish theatrics were just an act, and were an intentional ploy designed to disrupt the proceedings (118:29; 119:14).

Before the trial Brown said he understood that he would have to behave himself in order to represent himself at the trial (110:8-9). He apologized for his past bad behavior, and

expressly promised that he would not misbehave if he was allowed to represent himself at his trial (111:5, 25).

Therefore, the circuit court did not commit a legal error by allowing Brown to represent himself at the start of his trial, as Brown repeatedly insisted, because he had engaged in unruly, disruptive conduct at pretrial proceedings. The court properly rescinded Brown's self-representation when he broke his promise and resumed his deliberate and intentional disruptive behavior at the trial (117:70-71).

Brown claims on appeal that he could not understand a simple motion. Brief for Defendant-Appellant at 47.

But the competency examination concluded that Brown was perfectly capable of comprehending the procedures and issues in his case (18:4; 29:3).

Besides, what Brown actually claimed in the circuit court was that the court conspired with his standby attorney to get counsel to have him sign a motion to dismiss the violation of his constitutional right to a speedy trial (110:5). In context, the record shows that this claim was simply part of an outburst where Brown charged the court with conspiracy, and ordered the bailiff to arrest the judge for violating his constitutional rights (110:5-6).

Brown reprised his claim about the motion being to dismiss the violation of his right to a speedy trial as a stratagem for dismissing his standby attorney he claimed was working against his interests (111:6-8).

The motion was entitled "motion to dismiss – violation of right to a speedy trial" (22:1) (upper case omitted), so it was easy for Brown to simply ignore the hyphen and pretend that the motion was to dismiss the violation of the right to a speedy

trial, despite the fact that the body of the motion clearly stated that it sought dismissal of the action on the ground that Brown's right to a speedy trial was denied (22:1).

There was no misunderstanding, just more misconduct deliberately designed as a ploy to disrupt the criminal proceedings anyway Brown could.

In any event, lack of legal knowledge does not disqualify a defendant from representing himself. *Faretta*, 422 U.S. at 835; *Susan P.S.*, 293 Wis. 2d 279, ¶ 18; *Marquardt*, 286 Wis. 2d 204, ¶ 60.

Brown says he could not represent himself because he lacks judgment and insight. Brief for Defendant-Appellant at 47.

But Brown fails to cite any authority that a defendant must have judgment and insight to exercise his constitutional right to represent himself.

To the contrary, considering the old saying that a person who represents himself has a fool for an attorney, it is arguable that anyone who chooses to represent himself lacks judgment. As the Supreme Court said in more legal language that nevertheless echoes the vernacular, "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. . . . [H]e should be made aware of the dangers and disadvantages of self-representation . . . ." *Faretta*, 422 U.S. at 835.

So although a defendant may conduct his own defense ultimately to his own detriment, his choice to represent himself must be honored. *Faretta*, 422 U.S. at 834. The defendant cannot thereafter complain that the quality of the defense he presented

for himself amounted to ineffective assistance. *Faretta*, 422 U.S. at 834 n.46.

Finally, Brown claims that he had "psychological issues" that kept him from being competent to represent himself. Brief for Defendant-Appellant at 47-48.

But that claim was rejected in both competency evaluations, which found that Brown did not suffer from any mental disease or defect that would adversely impact his ability to represent himself (18:3-4; 29:2-4). Among other things, the examiner found that Brown's alleged "suicide attempt" was just a gesture to draw attention to his complaints about his treatment in jail (29:2), just another of Brown's theatrical antics deliberately designed to disrupt whatever Brown did not like, which was just about everything involving his prosecution.

The record fully supports the circuit court's decision to grant Brown's repeated requests to represent himself at the beginning of his trial, and its further decision to require Brown to be represented by counsel after he forfeited his right to represent himself by his misconduct after the trial commenced.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: May 27, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,474 words.

Dated this 27th day of May, 2015.

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Thomas J. Balistreri
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of May, 2015.

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