COURT OF APPEALS
DECISION
DATED AND RELEASED

December 3, 1996

No. 96-1768-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CALVIN MORRISON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded with directions.*

MYSE, J. Calvin Morrison appeals a judgment of conviction for disorderly conduct and an order denying a motion for a new trial based upon the court's failure to adequately advise him of his right to counsel during the trial. Morrison contends that the lack of a colloquy with the court in regard to his right to counsel requires a new trial because he did not understand the advantages of retaining counsel or the difficulties of proceeding pro se. Because the record demonstrates the court did not advise Morrison of his right to counsel and that the surrounding circumstances are inadequate to demonstrate a waiver should be implied by law, a new trial is required. We therefore reverse and remand with directions to order a new trial.

Morrison was charged with one count of disorderly conduct arising out of an altercation during which he sustained a broken jaw. Morrison was tried jointly with a co-defendant, John Majio, who was represented by counsel throughout the proceedings. Morrison appeared at his initial appearance without counsel. No inquiry was made on the record in regard to counsel at that point.

Subsequently, Morrison appeared in court in relation to a pretrial conference and again no inquiry was made in regard to his intention or understanding of his right to counsel. The court inquired whether Morrison intended to be represented by an attorney when Morrison once again appeared without counsel at a pretrial conference. Although Morrison equivocated in his answer, he ultimately concluded that he felt it would be in his best interest to be represented by counsel. The court then admonished him to have counsel available at trial.

The trial, however, did not take place as originally scheduled and a subsequent status conference was held. Morrison did not appear nor was he represented by counsel at this proceeding. A warrant was issued for Morrison's arrest and he ultimately appeared the following day by virtue of the execution of the warrant. Once again, the court made a general inquiry as to Morrison's intent in obtaining representation at his trial scheduled for the following week. Once again, Morrison equivocated but ultimately indicated that he had talked to an attorney. Upon the court's inquiry, it was disclosed that the attorney he had discussed the matter with was the attorney representing his co-defendant. The court warned Morrison that because of potential conflicts, that attorney might not be available to represent Morrison at the trial.

During these proceedings, Morrison inquired as to his right to compel the State to produce a list of the witnesses the State would call at trial. The district attorney and the court both advised Morrison that he had no such right. No further conversation in regard to discovery was had at those proceedings. Morrison appeared on the day of trial without counsel. No inquiry was made concerning the absence of counsel or Morrison's intent to have counsel at these proceedings. Morrison appeared pro se throughout the proceedings and was convicted following the jury trial of disorderly conduct.

Morrison filed a postconviction motion for a new trial based upon the court's failure to adequately advise him of his right to counsel. At the motion hearing, the State demonstrated that Morrison had been mailed a standard form containing information in regard to his right to counsel and directions to the public defender's office if he was unable to afford counsel. Morrison testified that he did not want to proceed pro se but did not believe he qualified for a public defender. Although Morrison indicated he had some general awareness of his right to counsel by virtue of a past criminal traffic violation, he contended that he was unaware as to the procedures if he was unable to retain counsel on his own.

The trial court concluded that Morrison had waived his right to counsel by his conduct and denied the motion for a new trial. In determining waiver, the court noted that Morrison had received two written notices that identified his right to counsel and that he had represented to the court his intention to retain an attorney for the trial. Based on this information, the court concluded he made a knowing and voluntary waiver to proceed without counsel.

The question whether a defendant has knowingly and voluntarily waived his right to counsel presents an issue of constitutional fact this court reviews independently of the trial court. ***State v. Verdone***, 195 Wis.2d 476, 480, 536 N.W.2d 172, 173 (Ct. App. 1995). This court is required to indulge in every reasonable presumption against waiver. ***Brewer v. Williams***, 430 U.S. 387, 404 (1977). The right to counsel is one of the essential rights guaranteed by the constitution. ***Pickens v. State***, 96 Wis.2d 549, 555, 292 N.W.2d 601, 605 (1980). Because of the importance of this right, a knowing and intelligent waiver is a prerequisite to a defendant's proceeding pro se. ***Id.*** (citing ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). Nonwaiver is presumed, and waiver of the right to counsel must be affirmatively shown to be knowing and voluntary. ***Id.*** "The State has the burden of overcoming the presumption of nonwaiver." ***Verdone***, 195 Wis.2d at 480, 536 N.W.2d at 173. An invalid waiver of counsel can require a new trial. *See* ***id.***, at 480-81, 536 N.W.2d at 174; *see also* ***State v. Klessig***, 199 Wis.2d 397, 404-05, 544 N.W.2d 605, 608-09 (Ct. App. 1996).

The State acknowledges that the court did not engage in any colloquy with Morrison in regard to this right of counsel, but argues a waiver can be implied by law through his conduct. *See* ***State v. Cummings***, 199 Wis.2d

722, 753, 546 N.W.2d 406, 418 (1996) (defendant's actions may waive right to counsel in "unusual circumstances."). This court, however, concludes nothing in Morrison's conduct, his statements or his present claim supports the trial court's determination that a waiver should be implied by law. The court said nothing in regard to counsel at Morrison's two initial appearances nor was he advised at any time of the advantages of having counsel or the disadvantages of proceeding pro se.

When the court did address Morrison in regard to the question of counsel, Morrison indicated his intention to proceed with counsel. We agree that the court was not obligated to engage in a prolonged colloquy in regard to the issue of counsel after being advised that Morrison intended to obtain counsel. Had a colloquy between the court and Morrison occurred prior to trial advising him of his right to counsel and the consequences of appearing pro se on the trial date, the State's waiver by conduct argument would be substantially enhanced. When Morrison appeared at trial pro se, however, it was incumbent upon the court to determine whether his decision to appear was knowingly and intelligently made and represented an exercise of his desire to appear without the benefit of an attorney. When the court failed to make this important inquiry, it failed to create a record that sufficiently reflects Morrison's appearance was the result of a knowing and intelligent decision to appear at trial without the benefit of counsel.

The State properly notes that a waiver may be implied at law based upon a defendant's conduct. These cases, however, represent situations in which repeated efforts to provide counsel have been made to a defendant who ultimately rejects all offers of assistance. Indeed, in ***State v. Haste***, 175 Wis.2d 1, 500 N.W.2d 678 (Ct. App. 1993), the defendant even suggested his desire to appear pro se. In this case, none of the aggravated and uncooperative attitudes present in other cases resulted in Morrison's not having counsel at the trial.

Here, Morrison acknowledged on a number of occasions, albeit in an equivocal fashion, his intention to proceed with counsel. When he appeared at trial pro se, the court should have been alerted to the fact that he was not going to have the assistance of counsel at trial. It was then incumbent upon the court to determine whether this was the result of a knowing and voluntary decision being made by Morrison or whether the absence of counsel was due to

other circumstances. Based upon the presumption against waiver, the absence of any indication that Morrison specifically wished to proceed pro se, and the court's failure to inquire whether the absence of counsel was the result of Morrison's knowing and voluntary decision, this court finds that a new trial is required.

The State argues that this court should find the absence of colloquy in regard to Morrison's right of counsel to be harmless error under the doctrine of ***Klessig***. This court concludes that ***Klessig*** is inapposite to the present case because Morrison specifically asserts that he did not understand the difficulties involved in pro se representation. Morrison asserts that his lack of understanding as to the benefits of counsel deprived him of the right to make pre-trial discovery demands upon the State, properly cross-examine State witnesses during the trial and to effectively introduce evidence in support of his self-defense theory. The claim that he did not fully understand the waiver of counsel and its implication as to each of these elements is a sufficient showing of prejudice to shift the burden to the State of showing that he was either adequately advised or made a knowing, intelligent waiver of his right to counsel. We cannot conclude that the court's failure to address this matter was harmless error.

By the Court.—Judgment and order reversed and cause remanded with directions.

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