COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP360-CR **Cir. Ct. No. 2002CF3585**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD R. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 DYKMAN, J. Reginald Carter appeals from a judgment of conviction for first-degree reckless injury contrary to WIS. STAT. § 940.23(1)(a)

(2003-04)[1] and possession of a firearm by a felon contrary to WIS. STAT. § 941.29(2). He also appeals from a denial of his postconviction motion for a new trial, asserting that he was denied his right to testify. He contends that his waiver of the right to testify was invalid because the trial court failed to conduct a proper colloquy to ensure that the waiver was knowing and voluntary. He further contends that the trial court coerced him into not testifying by providing advice that was based on a misstatement of the law and dwelling on the potential negative consequences of testifying.

¶2 We conclude on the postconviction hearing record that Carter's waiver was knowing and voluntary, notwithstanding the trial court's failure to conduct a proper colloquy. Additionally, we conclude the trial court's postconviction finding that its misstatement of the law did not affect Carter's waiver of his right to testify was not clearly erroneous. Therefore, the trial court's misstatement did not render his waiver unknowing or involuntary. For these reasons, we affirm the trial court's denial of Carter's motion for a new trial and the judgment of conviction.

Background

¶3 A jury convicted Carter of first-degree reckless injury and possession of a firearm in connection with a June 23, 2002 shooting in Milwaukee County. At the conclusion of the State's case, Carter's trial counsel moved to dismiss the charges against Carter. The court then engaged Carter in a colloquy regarding Carter's decision whether to testify. Relevant portions of this colloquy

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

are set forth in the discussion section. Ultimately, Carter did not testify and the court did not discuss the matter further with him. Carter was convicted and moved for a new trial, alleging that he was denied his right to testify because the trial court's colloquy did not properly advise him of this right.

¶4 The trial court held an evidentiary hearing on Carter's motion. Carter's trial counsel testified that he advised Carter of his right to take the stand in his own defense. Carter did not testify at the postconviction hearing. Relevant portions of the hearing transcript are included in the discussion section. At the conclusion of the hearing, the court agreed that its colloquy did not properly advise Carter of his right to testify. However, it concluded that despite this error, testimony at the postconviction hearing established that Carter's waiver of his right to testify was knowing and voluntary. The court also found that a misstatement of law it had made to Carter when addressing his decision to testify did not factor into his waiver of the right to testify. Carter appeals.

Discussion

¶5 "The right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." ***State v. Flynn***, 190 Wis. 2d 31, 49, 527 N.W.2d 343 (Ct. App. 1994) (*quoting* ***Rock v. Arkansas***, 483 U.S. 44, 53 n.10 (1987)). This right is "part of the due process rights of the defendant protected by the Fourteenth Amendment." ***State v. Albright***, 96 Wis. 2d 122, 128, 291 N.W.2d 487 (1980) (footnote omitted). It is "personal to the defendant, and may be waived only by the defendant." ***Flynn***, 190 Wis. 2d at 49 (citation omitted). A defendant's waiver of the right to testify must be knowing and voluntary to be valid. ***Id.*** When a defendant waives the right to testify, a circuit court has an affirmative duty to conduct an on-the-record colloquy to ensure that the

defendant's waiver is knowing, intelligent and voluntary. ***State v. Weed***, 2003 WI 85, ¶¶40-41, 263 Wis. 2d 434, 666 N.W.2d 485.

¶6 A trial court's postconviction ruling on whether a waiver of a fundamental right is knowing and voluntary presents mixed questions of fact and law. ***State v. Arrendondo***, 2004 WI App 7, ¶12, 269 Wis. 2d 369, 674 N.W.2d 647. We review the trial court's findings of fact under the clearly erroneous standard of review. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. The application of those facts to a constitutional standard is a question of law that we review de novo. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶7 Carter contends that his decision not to testify was not knowing and voluntary because the trial court did not conduct a colloquy to ensure that his waiver of the right to testify was knowing and voluntary. Carter also contends that the trial court coerced him into waiving his right to testify by dwelling excessively on the potential negative consequences of testifying and stating that he "would lose the presumption of innocence" if he testified but later refused to answer the prosecutor's questions. We address these two contentions in turn.

Failure to Conduct a Proper Colloquy Advising of Right to Testify

¶8 At trial, the court engaged Carter in the following colloquy regarding his decision whether to testify:

> THE COURT: Mr. Carter, there has been some discussion between your lawyer and the Court as to whether or not strategically he is going to have you take the witness stand. You need to know that you have an absolute constitutional right to remain silent. It's your Fifth Amendment right to be free from self-incrimination. That you can stand silent, you have no burden, that the State has the burden of proving each of these charges beyond a

reasonable doubt. You may remain silent. Your silence cannot be used against you in any way by the jury and they would be so instructed. If you wish to take the witness stand, you would be giving up the Fifth Amendment right, the constitutional right, and I need to know and make sure that you're doing so freely, voluntarily, and knowingly.

Do you understand that you do have an absolute constitutional right to be free from self-incrimination, sir?

CARTER: Yes ma'am. Yes ma'am.

THE COURT: Do you understand what that right is, that you cannot be made to take the witness stand and give testimony against yourself in this matter? Do you understand that?

CARTER: Yes ma'am.

THE COURT: Do you understand that your silence cannot be used by the jury against you?

CARTER: Yes ….

THE COURT: Do you understand that if you waive that right, that you will be subject to both direct and cross examination, that once you take the witness stand and you agree to answer questions from your lawyer, you are also agreeing to answer questions from the State?

Now, if you at some point during that examination decide, well, there's questions the State's asking you that you just simply aren't going to answer at that point, it's too late to turn back, you can invoke your Fifth Amendment right, but I can instruct the jury that your refusal to answer those questions can in fact be used against you by the jury. You can't sort of switch on and off. You have to make a decision one way or the other.

If you decide not to take the stand you can remain silent and the jury will be so instructed they cannot use the silence against you. If you take the stand and freely answer questions by your lawyer, but refuse to begin to answer questions put to you by the State, you lose the presumption of innocence in terms of your refusal to answer questions. Do you understand that?

CARTER: Yes ma'am.

....

THE COURT: Have you had a sufficient amount of time to talk about this, that is, your desire to take the witness stand, or your desire to remain silent? Have you had enough time to talk about that with your lawyer?

CARTER: We talked about it.

THE COURT: Do you think you've had enough time to explore it, the pluses and the minuses, the pros and cons of doing that, with your lawyer?

CARTER: Yeah.

THE COURT: Well, you're hesitating, is there—do you need additional time to think about that with your lawyer?

CARTER: Yes, I need additional time.

THE COURT: All right. You're going to be given additional time, but I want you to understand once you talk to your lawyer, and after—I assume it's your mother who's going to be testifying, a decision's going to be made by your lawyer and you as to whether or not you're then going to take the witness stand. I'm not going to bring you back in again and—and—and discuss this. I want you to understand up front what you're doing if you do waive and give up your right to remain silent and take the stand.

The other issue that you should be aware of is if you take the stand, you're subject to being asked about your prior criminal record. I've ruled on that. Apparently there is an agreement that there are two prior convictions that the State feels comfortable they could prove up or have evidence of, and so if you are asked whether or not you have ever been convicted of a crime and you answer yes, if you are asked how many times and you answer two, that's the extent of that examination. Neither party can—or the State can't go any further with that.

The jury would be instructed that that information about you, those facts about you can only be used insofar as your credibility, your believability as a witness. They will be instructed that they can't use the fact that you were convicted of, on two prior occasions, as evidence of your guilt in this matter, but that they can use it to assess your credibility as a witness.

Do you understand that if you take the witness stand you would be subject to an examination along those lines?

> CARTER: Yes ma'am.
>
> THE COURT: Okay. Do you have any questions of me about your Fifth Amendment right and how that would play out should you decide to take the stand or not take the stand in this case?
>
> CARTER: No ma'am.
>
> THE COURT: All right. The Court is going to find that at this point you have been properly advised by your counsel and by the Court as to your Fifth Amendment right to remain silent and to be free from self-incrimination. I'm going to find that any discussions you have with your lawyer will be strategic in nature going forward as to whether you do or do not take the stand, but that you recognize that if you do take the stand you're waiving your Fifth Amendment right, and that if you remain silent and choose not to, that your silence cannot be used against you.
>
> I'm finding that you understand all of that, and if you do decide to take the witness stand I'm going to determine again outside the presence of the jury that you're doing so with a full understanding that's made—your understanding that is voluntary and intelligent in terms of your decision whether to take the stand or not take the stand.

The State does not dispute that this colloquy failed to ensure that Carter's waiver of his right to testify was knowing and voluntary. The record shows that the trial court did not inform Carter at any time of his right to testify.

¶9 The State asks that we determine the appropriate remedy for the trial court's failure to properly advise Carter of his right to testify. Carter has not developed an argument addressing the issue of remedy and has not filed a reply brief. He merely requests that we reverse his conviction and remand for a new trial. The State contends that the appropriate remedy for a trial court's failure to properly advise a defendant of his or her right to testify is for the trial court to order a postconviction hearing at which the State has the opportunity to prove that,

notwithstanding the trial court's error, the defendant's waiver was knowing and voluntary.

¶10 The State notes that the Wisconsin Supreme Court has recognized that a postconviction hearing is the appropriate remedy following a trial court's failure to conduct a required colloquy when the defendant waives the right to a jury trial, ***State v. Anderson***, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301, or the right to counsel, ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). The State urges us to adopt the ***Klessig/Anderson*** approach here and hold that a postconviction hearing is always the appropriate remedy when a defendant seeks to waive the right to testify and the trial court fails to engage a colloquy. We decline to adopt such a rule.

¶11 In ***State v. Weed***, *supra*, the supreme court expressly declined to adopt such a rule because the issue of remedy was not sufficiently briefed. ***Weed***, 263 Wis. 2d 434, ¶47. The ***Weed*** court explained:

> [W]e decline to determine whether a post-conviction hearing would always be sufficient to ensure that a criminal defendant has waived his or her right to testify…. [W]e do not decide the appropriate remedy if a circuit court fails to conduct an on-the-record colloquy with a criminal defendant to ensure that the defendant is waiving his or her right to testify. As we have stated before, such a determination should be made with the benefit of briefs and argument on the merits by parties who take adverse positions.

Id. (citations omitted). As in ***Weed***, the issue of remedy has not been sufficiently briefed here. Carter did not argue the issue of remedy in his brief-in-chief, other than to suggest in his conclusion a reversal of his conviction and a new trial, and he has not filed a reply brief that could have responded to the State's arguments about this issue. For this reason, we decline to adopt a rule that a postconviction

hearing is always the appropriate remedy when a trial court fails to conduct a colloquy for a defendant seeking to waive his or her right to testify.

¶12 Instead, we examine whether the postconviction hearing in Carter's case established that his waiver was in fact knowing and voluntary, regardless of the trial court's error. At the postconviction hearing, Carter's trial counsel provided the following testimony regarding Carter's decision whether to testify:

> ASSISTANT DISTRICT ATTORNEY (ADA): Did you have an adequate opportunity while the trial was progressing to consult as often as you needed to in private with your client, Mr. Carter, about his choice whether or not to testify?
>
> COUNSEL: Yes, I believe that issue was ongoing from the beginning of the trial through the time we rested basically. And I know that that issue was a predominant one from the beginning of the representation.
>
> ….
>
> ADA: Did Mr. Carter ever express to you, during the course of this decision-making process, any concern that he would be harmed in any way by testifying in his own behalf?
>
> COUNSEL: If I understand your question, I don't think he made those expressions specifically.
>
> ADA: Did he ever react in any way because of that mention of the loss of presumption of innocence during that colloquy with the court, did he ever react in any way in telling you that he was worried about that action if he chose to exercise his right to testify?
>
> COUNSEL: I'm confident he did not comment on the presumption of innocence remarks. I—I can give you what my perception is now of albeit a couple years after the fact.
>
> ….
>
> ADA: [Y]ou say he did express to you some rationale, some reasons—reasoning as to why he didn't take the stand? If you can recall.

> COUNSEL: I think that he was pleased with the—the posture of the case at the time it went to the jury ….
>
> ….
>
> ADA: Did you get the sense from your dealings with Mr. Carter over those several months that he was smart enough and—and aware enough and competent to make those decisions for himself?
>
> COUNSEL: Yes, I think he was intelligent and competent.
>
> ADA: [I]s one of the things you did in helping him make th[e] decision [about whether to testify] … [to] advis[e] him that … he was the only one who could decide whether he was going to get on that stand or not?
>
> COUNSEL: Definitely.
>
> ….
>
> ADA: Did you also make sure that Mr. Carter understood that he had the legal right to testify if he wished to do so?
>
> COUNSEL: Yes.
>
> ….
>
> COUNSEL: [M]y recollection is that it was absolutely not, he was not going to … take the stand. It wasn't—I'm not sure what to do, the judge is leaning on me, I better choose one way. He was very firm in his decision not to take the stand.

¶13 Based on the foregoing testimony and our review of the entire record, we conclude that, notwithstanding the trial court's failure to conduct the required colloquy, Carter's waiver of his right to testify was knowing and voluntary. Carter's attorney affirmed that throughout the trial he had discussed with Carter the question of whether Carter would testify. He agreed that he had made sure that Carter understood that he had the legal right to testify. He affirmed that he explained to Carter that Carter "was the only one who could decide whether he was going to get on that stand or not." Finally, our review of the trial court's comments at the conclusion of the hearing shows that it gave substantial

weight to the postconviction hearing testimony of Carter's counsel when it determined that Carter's wavier was effective. *See* WIS. STAT. § 805.17(2) (determining the weight of evidence is matter within the province of the trial court). We conclude that based on the testimony of Carter's counsel and the absence of contrary testimony in the record that Carter's waiver was in fact knowing and voluntary.

¶14 Our analysis follows that of the ***Weed*** court. There, the defendant did not testify on her own behalf and the court did not conduct a colloquy to determine whether her waiver of the right to testify was knowing and voluntary. ***Id.***, ¶6. A jury found Weed guilty and she moved for postconviction relief, asserting, among other things, that her waiver of the right to testify was not knowing and voluntary. ***Id.***, ¶7. Weed testified at the hearing that she was never informed of her right to testify, while her attorney testified that he had discussed with her the right to testify on several occasions. ***Id.*** The supreme court concluded that, despite the circuit court's failure at trial to ensure that the waiver was knowing and voluntary, the postconviction testimony of Weed's trial counsel (among other evidence not discussed here) demonstrated that her waiver of the right to testify was in fact knowing and voluntary. Like the ***Weed*** court, we have reviewed the entire record, including the postconviction proceedings. And as in ***Weed***, the testimony of the defendant's counsel that he advised his client of his right to testify demonstrated that the defendant's waiver was knowing and voluntary, notwithstanding the court's failure to engage the defendant in a colloquy.

Misstating the Law and Dwelling Excessively on Pitfalls of Testifying

¶15 Carter contends that the trial court coerced him into waiving his right to testify by dwelling excessively on the negative aspects of testifying and misstating the law when it told Carter that he "would lose the presumption of innocence" if he took the stand but refused to be cross-examined by the State. The State does not dispute that the court misstated the law. Rather, it contends that following the postconviction hearing the trial court found that its misstatement did not affect Carter's decision not to testify. The State asserts that we may not upset this factual finding because it is not clearly erroneous. Finally, the State argues that, because the trial court's incorrect and misleading advice was not, as a matter of fact, a factor in Carter's decision to waive his right to testify, his waiver could not have been unknowing or involuntary. We agree with the State.

¶16 We will uphold a trial court's factual findings unless they are clearly erroneous. Under this standard of review, "even [if] the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168 (citation omitted).

¶17 The record supports a finding that Carter knowingly and voluntarily waived his right to testify despite the trial court's misstatement of the law and its focus upon the potential pitfalls of testifying. At the postconviction hearing, Carter's counsel testified that he was "confident [Carter] did not comment on the presumption of innocence remarks." He further testified that Carter's decision was not affected by statements of the trial court: "It wasn't—I'm not sure what to do, the judge is leaning on me, I better choose one way. He was very firm in his

decision not to take the stand." This evidence is sufficient to support the trial court's finding that Carter knowingly and voluntarily waived his right to testify.

¶18 Logically, something that is not a factor in a defendant's decision to waive his or her right to testify cannot render that waiver unknowing or involuntary. The State cites several cases from other jurisdictions concerning the knowingness and voluntariness of a defendant's waiver of a fundamental right that make this point. In ***People v. Henderson***, 568 N.E.2d 1234, 1270 (Ill. 1990), a defendant at a death-penalty sentencing hearing contended that "because the trial judge incorrectly explained the procedure used when a jury decides whether a death sentence should be imposed, he did not knowingly and intelligently waive his right to have a jury at the sentencing hearing." The ***Henderson*** court examined the record and determined that the "defendant's waiver decision was not based, even in part, on the judge's misstatement of the law" and that, therefore, it "f[ound] the defendant's waiver to have been knowing and intelligent." ***Id.*** at 1270-71. We agree with the ***Henderson*** court's analysis. A fact or circumstance that does not contribute to a defendant's waiver decision cannot cause that waiver to be unknowing or involuntary.

Conclusion

¶19 In sum, we conclude that the trial court's failure to conduct a proper colloquy did not render Carter's waiver of his right to testify unknowing or involuntary because postconviction testimony established that his waiver was, in fact, knowing and voluntary. We further conclude that the trial court's determination that its misstatement of the law was not a factor in Carter's decision not to testify was not clearly erroneous, and that, therefore, its misstatement did not cause his waiver to be unknowing or involuntary. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.