COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2281-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TREVOR D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, P.J.[1] Trevor D. Jones appeals from a judgment convicting him of unlawfully driving a motor vehicle while intoxicated in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

violation of WIS. STAT. § 346.63(1)(a) (1997-98),[2] and an order denying his motion for postconviction relief. Jones claims that the trial court erred by determining that he knowingly, intelligently, and voluntarily waived his right to counsel. We conclude that the court's colloquy with Jones was insufficient to ascertain that Jones knowingly, intelligently, and voluntarily waived his right to counsel. We therefore reverse.

BACKGROUND

¶2 Jones was charged with operating a motor vehicle while under the influence of an intoxicant.[3] He asked for a public defender, but did not qualify to receive a lawyer because his income was too high. About two weeks after he was arrested, Jones lost his job. He called the public defender's office to inform it of his change in situation. It is not clear what else Jones told or asked the staff member from the public defender's office, but Jones testified that he was told at some point during the phone conversation that he did not qualify for a lawyer. Jones assumed he could not reapply although he still desired assistance from a lawyer.

¶3 At a December 2, 1999 proceeding, Jones appeared without counsel and indicated he was willing to plead guilty. The trial court informed Jones that he would first have to fill out a waiver of counsel questionnaire and a guilty plea questionnaire and waiver of rights form. Jones filled out the forms and appeared

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] Jones faced other charges that were eventually dismissed.

at a December 9, 1999 hearing. The trial court briefly questioned him about both his waiver of counsel and his guilty plea, and found him guilty. Jones appeals.

DISCUSSION

¶4 We first address whether Jones knowingly, intelligently, and voluntarily waived his right to counsel. When an individual elects to proceed pro se, the court must insure that the individual has knowingly, intelligently, and voluntarily waived his or her right to counsel. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Whether Jones knowingly, intelligently, and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case, a question of law that we review independently of the circuit court. ***Id.*** at 204. There is a presumption that a waiver of counsel is invalid unless the waiver is affirmatively shown to be knowing, intelligent, and voluntary. ***Id.*** The State has the burden of overcoming the presumption of non-waiver. ***Id.***

¶5 The Wisconsin Supreme Court mandates using a colloquy in every waiver of counsel case where a defendant seeks to proceed pro se. ***Klessig***, 211 Wis. 2d at 206. The purpose of the colloquy is to show a defendant's knowing and voluntary waiver of the right to counsel. ***Id.*** Conducting such an examination is the clearest and most efficient means of insuring that the defendant has waived his right to the assistance of counsel, and of preserving and documenting a valid waiver for purposes of appeal and postconviction motions. ***Id.***

¶6 At the December 9 hearing, the trial court conducted the following colloquy with Jones:

> THE COURT: You have filled [in] now and signed and provided to me the Guilty Plea Questionnaire and Waiver

> of Rights form and the Waiver of Counsel Questionnaire. I'm assuming given the time frame, you've probably read over these more than once?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: And do you understand the contents of each?
>
> DEFENDANT: Yes, I do.
>
> THE COURT: Do you understand what your rights are and what you would be waiving or giving up by pleading guilty?
>
> [DEFENDANT]: Yes.
>
> THE COURT: And by pleading guilty, you're admitting to the facts in the Complaint which apply to the charge?
>
> DEFENDANT: Yes.
>
> THE COURT: Based upon the plea of guilty and upon review of the complaint wherein a factual basis is found, I do find you guilty of operating a motor vehicle while under the influence of an intoxicant, third offense, in violation of 346.63(1)(a) of the Wisconsin Statutes contained in Count 1 of the Complaint.

¶7 In ***State v. Hansen***, 168 Wis. 2d 749, 751-52, 485 N.W.2d 74 (Ct. App. 1992), the trial court asked the defendant, who was represented by counsel, similar questions about a plea questionnaire used to establish the defendant's understanding of the rights being waived. The colloquy in ***Hansen*** proceeded as follows:

> THE COURT: Mr. Hansen, did you go over this questionnaire and waiver of rights form with your attorney?
>
> [HANSEN]: Yes, I did.
>
> THE COURT: Did you sign it?
>
> [HANSEN]: Yes.
>
> THE COURT: Did you understand it when you signed it?
>
> [HANSEN]: Yes, I did.
>
> THE COURT: All right. What plea do you wish to enter to the charges set forth in the information before the Court?
>
> [HANSEN]: No contest.

> THE COURT: You understand that on a plea of no contest, the Court, in all likelihood, is going to find you guilty?
>
> [HANSEN]: Yes.

Id. at 752.

¶8 We concluded that these questions were insufficient to secure a knowing waiver of the constitutional rights being relinquished. ***Id.*** at 755. The plea hearing colloquy in ***Hansen*** only established that the defendant had read and understood the form, not that he understood what constitutional rights he was waiving. While ***Hansen*** was a guilty plea case, we conclude that its analysis is helpful and offers guidance in the waiver of counsel context.

¶9 In this case, the trial court's colloquy in the plea hearing did not include a discussion as to the constitutional rights Jones was waiving by not having counsel. The colloquy was limited to whether Jones had read and signed both questionnaires and whether Jones understood the forms. The court did not determine whether Jones fully understood his rights or the consequences of waiving counsel. A further problem with the colloquy arose because the trial court asked Jones generally whether he understood the contents of both questionnaires rather than asking specific questions for each form.

¶10 When an adequate colloquy is not conducted and the defendant moves for a new trial or other postconviction relief, the circuit court must hold an evidentiary hearing to determine whether the waiver of counsel was knowing, intelligent, and voluntary. ***Klessig***, 211 Wis. 2d at 206-07. The trial court held an evidentiary hearing to determine whether Jones knowingly, intelligently, and voluntarily waived his right to counsel. To establish a valid waiver of counsel, the circuit court must ensure that the individual (1) made a deliberate choice to proceed without an attorney; (2) was aware of the challenges and disadvantages of

self-representation; (3) was aware of the seriousness of the charges against him or her; and (4) was aware of the general range of penalties that could be imposed. ***Id.*** at 206. "If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." ***Id.***

¶11 While the trial court did address some of Jones' arguments in the evidentiary hearing, it did not determine if Jones' waiver of counsel was knowing, intelligent, or voluntary. The trial court did not question Jones on whether he (1) made a deliberate choice to proceed without an attorney; (2) was aware of the challenges and disadvantages of self-representation; (3) was aware of the seriousness of the charges against him or her; and (4) was aware of the general range of penalties that could be imposed. *See* ***Klessig***, 211 Wis. 2d at 206.

¶12 The State argues that the waiver of counsel questionnaire addresses these points. Jones concedes that the questionnaire is thorough, but his responses on the questionnaire do not unequivocally indicate that he knew with what he was being charged and the maximum punishment for the violation. And beyond that, we cannot determine whether Jones fully understood the other parts of the questionnaire. During a guilty plea colloquy, the court may question a defendant's attorney, who can tell the court that he or she explained the law to the defendant. But in a waiver of counsel case, an appellate court cannot rely on an attorney's opinion to conclude that a waiver of counsel is valid. Hence, even with a well-written questionnaire, a colloquy is needed to provide information that a questionnaire cannot, and to make a record which will permit an appellate court to conclude that a defendant validly waived counsel.

¶13 The trial court correctly noted that Wisconsin case law did not explain how extensive a waiver of counsel colloquy should be. Nevertheless, a

colloquy is defined as a discussion or a conversation, and the record must contain some response from the defendant so that an appellate court can be confident that even on a cold record, a defendant understood. The Special Materials accompanying the Wisconsin Jury Instructions provide guidance in this kind of situation. *See* WIS JI–CRIMINAL SM-30. The Special Materials recommend that a trial court ask questions that encourage answers that go beyond "yes" or "no." ***Id.*** This way, the court can know it is not addressing a vacant or confused mind. "Additional questions will often be suggested by the defendant's responses." ***Id.*** at n.1. The Special Materials also recommend that the questions be designed to elicit more than one-word answers from the defendant. ***Id.*** "This is especially important in the context of an inquiry into waiver of counsel." ***Id.***

¶14 We agree with the trial court that it need not go over "item by item" each part of a waiver of counsel questionnaire to satisfy the colloquy requirement. No one particular question is required in every instance so that trial courts can tailor the inquiry to fit the case at hand and to fit the court's preferences. WIS JI—CRIMINAL SM-30 n.1. However, examples of questions are included in the Special Materials. For example:

> 1. Do you want to be represented by a lawyer?
>
> ....
>
> 5. You are charged with _____, which carries a maximum penalty of imprisonment for _____ years and a fine of ____, or both. If you are represented by a lawyer, he or she may discover information or facts which would be helpful in your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty. I want you to take this into consideration in deciding whether or not you want a lawyer to represent you.

WIS JI–CRIMINAL SM-30. Asking "Why?" or "Why not?" often leads to an answer that shows, on appeal, that a defendant understood what he or she was doing. We do not mandate that the trial court use these particular questions or use them in a specific context. However, the difficulty we face when a trial court poses questions which permit only a "yes" or "no" answer is that there is often no way to accurately determine on appeal that a defendant has voluntarily waived his right to counsel and understands the consequences of doing so.

¶15 The trial court also reasoned that there was nothing in the record to indicate that Jones wanted a lawyer. But there is also nothing in the colloquy to show that Jones knowingly and *voluntarily* waived his right to a lawyer. Waivers are presumed to be invalid, and the State has the burden to prove a valid waiver. ***Klessig***, 211 Wis. 2d at 204. The State cannot carry that burden unless we can independently determine that a defendant knowingly and voluntarily waived his right to counsel. We cannot. We therefore reverse Jones' judgment of conviction and remand with directions to permit Jones to withdraw his guilty plea.

¶16 We need not address Jones' argument regarding his plea questionnaire since Jones did not knowingly, intelligently, and voluntarily waive his right to counsel.

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

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).