

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2443-CR

Cir. Ct. No. 2004CF28

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT F. LINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Robert Lins appeals a judgment convicting him of one count of second-degree sexual assault with use of force, one count of false imprisonment, and one count of misdemeanor battery. He also appeals an order

denying his motion for postconviction relief. He argues that he did not knowingly waive his right to counsel and that the circuit court erred in sentencing him based on disputed factual information without giving him an opportunity to rebut it. We affirm in part, reverse in part, and remand for resentencing.

¶2 Lins first argues that he did not knowingly waive his right to trial counsel. “When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se.” See *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). To determine whether a defendant’s decision to waive the right to counsel is knowingly, intelligently, and voluntarily made, the circuit court must conduct a colloquy with the defendant to determine whether the defendant is aware “of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty.” *Id.* at 205 (quoting *Pickens v. State*, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980)). “Whether a defendant has knowingly, intelligently and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case,” which we review de novo. *Klessig*, 211 Wis. 2d at 204.

¶3 Lins contends that his waiver of the right to counsel was not valid because he did not understand the possible penalties he faced when he decided to proceed pro se. During the waiver colloquy, Lins told the court that he was aware of the seriousness of the charges against him and said that he knew that the maximum penalty he faced was forty years in prison. Lins actually faced up to forty-six years and nine months of imprisonment because the charges had been amended shortly before trial to include false imprisonment and battery. Lins contends that he was not aware that he faced this additional prison time.

¶4 Although the circuit court said nothing about the specific penalties pertaining to the false imprisonment and battery charges when the charges were amended or during the waiver colloquy, Lins acknowledged that he understood that the penalties against him included forty years of imprisonment. While forty-six years is more than forty years, Lins understood “the *general range* of possible penalties.” See *Pickens*, 96 Wis. 2d at 563. He was aware that he could spend a substantial amount of time incarcerated and was thus aware that his decision to proceed pro se was of great consequence. As aptly explained by the State, “the purpose behind the requirement that defendants know the general range of penalties they face” when they waive the right to counsel is to ensure that they know what they are doing and to ensure that their choice “is made with eyes open.” The six-year potential penalty difference was not of sufficient import as compared to the total length of time Lins faced to render Lins’s waiver of counsel involuntary.

¶5 Lins also contends that his waiver of the right to counsel was involuntary because the record does not establish that he understood that the charges had been amended from one count of second-degree sexual assault to include false imprisonment and misdemeanor battery. The record belies this claim. Lins was present when the information was amended to include the charges and when the charges were recited in detail at the beginning of trial. The circuit court referred to the charges (plural) that Lins faced during the waiver colloquy. Because Lins was present when the three charges against him were discussed on numerous occasions, we reject this argument.

¶6 Lins next argues that the circuit court erred at sentencing by considering disputed factual information without affording him an opportunity to rebut it. “A defendant has a due process right to be sentenced on the basis of true

and correct information.” *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998). “As part of the guarantee that he or she be sentenced on reliable information, a defendant has the right to rebut evidence that is admitted by a sentencing court.” *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999).

¶7 During sentencing, the prosecutor discussed at great length a prior incident in Iowa County involving Lins and the victim in which the victim alleged that Lins had violently assaulted her. Lins’s attorney objected to the prosecutor’s discussion of the Iowa County incident, explaining that he was not prepared to call rebuttal witnesses and arguing that the prosecutor’s extensive discussion of the matter was unfair. Counsel also argued that the facts as asserted by the prosecutor were not true and requested a hearing at which he could rebut the prosecutor’s version of events. The circuit court told the prosecutor not to discuss the incident further, but the prosecutor continued to argue that the Iowa County incident bore “on [Lins’s] risk to re-offend more than just about anything else that we have in this case” and that the prior assault showed that Lins was at great risk to reoffend, despite the fact that he was forty-nine years old and had no criminal record. The circuit court considered the prosecutor’s version of what happened and used that in sentencing Lins.

¶8 The circuit court should not have relied on the Iowa County incident in framing its sentence without first allowing Lins to rebut the testimony. Although the circuit court limited the prosecutor’s argument to some extent, the prosecutor continued to argue that Lins was at greater risk to reoffend based on the Iowa County allegations, and the court used that information in sentencing Lins. Because the circuit court did not allow Lins an opportunity to rebut the disputed factual allegations and relied on that information in sentencing, we conclude that

Lins is entitled to resentencing at a hearing in which he is permitted to rebut the prosecutor's account of what happened in Iowa County.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

