

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP96-CR

Cir. Ct. No. 2005CF116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY H. KOPSI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Jeffrey H. Kopsi appeals from a judgment of conviction and from an order denying his postconviction motion for plea

withdrawal and a new trial. Kopsi was convicted on two felony counts of failure to pay child support, contrary to WIS. STAT. § 948.22(2) (2005-06).¹ He contends that the circuit court denied him his constitutionally protected right to counsel, conducted an insufficient plea colloquy, and improperly participated in the plea negotiation by changing the plea to two felonies rather than one felony and one misdemeanor. We agree that the court did not engage in the proper inquiry before concluding that Kopsi had waived his right to counsel; therefore, we reverse and remand the matter for further proceedings.

Background

¶2 This case stems from several years of accumulating unpaid child support due from Kopsi to support his two sons in Green Lake County. The State charged Kopsi with four counts, one count of felony failure to pay support and one count of misdemeanor failure to pay support for each child. Kopsi appeared pro se at the initial appearance on August 7, 2006. He acknowledged the charges against him and requested a signature or low cash bond that would allow him to return to his family. He explained that if he could not return to work, his “fiancé and [his] three other children will be homeless.” The court set a \$5,000 cash bond at the State’s recommendation and Kopsi returned to jail.

¶3 The preliminary hearing took place on August 14, 2006. Kopsi informed the court that he did not understand whether he had a choice about whether to proceed with the hearing and stated “I would appreciate a lawyer.” He advised the court that the public defender had declined to represent him and thus

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

requested a court-appointed attorney. The court responded, “[A]t this particular point, we’re going to go forward with the preliminary hearing, because if you wished to have counsel, you needed to apply, and ... doing it at the outset of the hearing with witnesses gathered is not the correct time.” The court then heard testimony from the mother of Kopsi’s two sons and from the child support administrator for Green Lake County. The testimony established that Kopsi had failed to pay child support from November 11, 2004 to March 11, 2005 and again from March 15, 2005 to June 15, 2005. At the conclusion of the testimony, the court confirmed that Kopsi received a copy of the information containing the four charges against him and entered not guilty pleas on Kopsi’s behalf. The court then advised Kopsi that if he wished to have an attorney for the subsequent proceedings, he should “reconfer with the public defender,” and if he is not eligible for representation he “can apply for a court appointed counsel.”

¶4 The day after the hearing, August 15, Kopsi filed an application for court-appointed counsel. On his application, he listed liquid assets of \$9.89 and minerals or gems that could produce income of \$3,000 to \$20,000 if sold. He further indicated that he was unmarried, but betrothed, and had his fiancé and three children to support in Michigan. Kopsi met with the public defender’s office again on August 21 and was deemed ineligible based on the value of the gems in his possession.

¶5 On August 30, Kopsi returned to court without counsel. At this hearing, the State advised the court that it had “reach[ed] a resolution where the defendant has agreed to enter no contest pleas to count one and count two as charged in the information ... [and] the State would recommend we enter a diversion period.” The plea agreement required Kopsi to pay \$540 per month toward his child support obligation, with \$75 of that payment applied to his

arrearage. “Upon successful completion of a 5-year diversionary period, the State would move to dismiss both counts.” Successful completion meant that Kopsi’s arrearages would be paid off in five years.

¶6 The court then turned to Kopsi to ascertain whether he agreed with the terms presented by the State. The dialogue went as follows:

[COURT]: And have you in fact had an opportunity to read that plea diversion agreement in its entirety?

[KOPSI]: Yes, I have, Your Honor.

[COURT]: And you understand each and every provision of it?

[KOPSI]: Yes, I do.

[COURT]: And most notable, you would be required to enter pleas of guilty to counts one and two, both felony failures to support?

[KOPSI]: Yes, sir.

[COURT]: And the court would take convictions on those but adjourn this for a period of up to 60 months.

[KOPSI]: Yes, sir.

[COURT]: During that period, you would be required to do everything that the diversion agreement requires. If you don’t, the State could move to revoke. If that occurs and the Court grants the motion to revoke, you would be then back before the Court and be facing sentencing on these two felonies. Do you understand that?

[KOPSI]: Yes, I do, Your Honor.

The court went on to engage Kopsi on the issue of legal representation. The court confirmed that Kopsi had been advised of his right to counsel, that he understood he had the right to be represented either by privately retained counsel, by court-appointed counsel, or by the public defender’s office, and that in deciding to

proceed with the plea agreement Kopsi was waiving his right to an attorney. Kopsi responded “Yes” on each point.

¶7 Later in the hearing, the court again asked Kopsi if he was “proposing to enter guilty pleas to two separate counts of failure to support, both felonies.” Kopsi stated he was. The court asked, “If you had more time to think about this, to consult further with your family, a lawyer, or anyone else you seek advice from, would you still enter the same guilty pleas?” Kopsi said he would.

¶8 The court then took up the particulars of the written plea agreement, and noted that the document referred to counts one and two of the information. As the court was about to advise Kopsi of the potential punishment he faced should he violate the diversion agreement, it noticed the information identified count two as a misdemeanor. The following exchange took place:

[COURT]: And you understand that conviction on either of those could result as a Class I felony—excuse me, class—count one is a Class I felony, count two is a misdemeanor, is that correct? Is that the intent?

[PROSECUTOR]: Your Honor, that was not in the initial offer, but the initial agreement was it would be to count—to the two felony counts. However, the State is satisfied upon the discussions that it had with [Kopsi] on August 18 that a plea to one of the felony counts would be sufficient as well as one of the misdemeanors. We’d request to proceed under that guise.

[COURT]: Well, Mr. Kopsi what was your intent?

[KOPSI]: [T]he original plea agreement was to count one and three, and I do have counts one and two in here.

[COURT]: Was it your expectation to plead to two felonies?

[KOPSI]: Yes, it was.

[COURT]: And you’re willing to proceed on that basis?

[KOPSI]: To plea to the two felonies or to the original one and two?

[COURT]: Two felonies.

[KOPSI]: Yes, sir, I would.

[COURT]: Then the Court will direct that the plea diversion agreement reflect counts one and three versus one and two. Then to review that, Mr. Kopsi, you are entering pleas to two separate felony counts, one and three would cover the period, November 11, 2004 to March 11, 2005 and that would be for two separate children. Do you understand?

[KOPSI]: Correct.

¶19 On February 23, 2007, the State moved for entry of judgment against Kopsi on grounds that Kopsi had breached the diversion agreement by failing to comply with his child support obligation. The court held a motion hearing on June 1, where Kopsi appeared with counsel. Kopsi did not oppose the motion. The State recommended four years' probation with the condition that Kopsi keep current on his child support and pay his arrearage of \$41,845.38. The State also recommended "some imposed and stayed prison ahead of that probation." Specifically, it recommended one year of initial confinement followed by two years of extended supervision. Kopsi asked the court to follow the State's recommendation not to impose jail time because he was "working hard at earning more money so he [could] get this debt paid." Kopsi advised the court that his sole source of income derived from the sales of minerals on eBay for the past five years along with some tour guiding he had recently been doing for people who wanted to prospect for their own minerals. He estimated his annual income from his mineral sales to be "somewhere between seven and twelve thousand, in that range."

¶10 The court granted the State’s motion, entered judgment, and imposed a sentence of three and one-half years for each felony, eighteen months of initial confinement and two years of extended supervision, to be served consecutively. It stayed the sentences and placed Kopsi on probation, with the conditions that he pay any court costs due, that he pay his child support debt in full, and that he then remain current until his children age out of the child support program. The court then imposed and stayed a six-month jail sentence “to allow the supervising [probation] agent to use it as necessary” as an alternative to revoking probation.

¶11 By postconviction motion filed October 31, 2007, Kopsi sought to withdraw his plea. He argued that he was denied his right to counsel, his plea was invalid, and the court improperly participated in the plea negotiations. The court heard arguments on the motion at a hearing on December 14, 2007. At the hearing, Kopsi presented the testimony of Dr. Charles Morgan, who had treated Kopsi for depression and fibromyalgia and offered expert opinion related to Kopsi’s limited ability to find and keep a job. Kopsi also testified regarding his efforts to obtain an attorney for past proceedings and the special circumstances surrounding his gems as his source of income. The court denied Kopsi’s motion. Kopsi appeals.

DISCUSSION

¶12 Kopsi raises the three issues he presented at the postconviction motion. He first asserts that the circuit court failed to engage in the proper indigence evaluation required by *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). Next he contends that his guilty plea was invalid because it was not entered voluntarily, knowingly and intelligently and because the court failed to

establish that a factual basis existed for the plea; specifically, whether Kopsi's failure to pay fell under the affirmative defense of inability to pay. Finally, Kopsi argues that the circuit court improperly participated in the plea negotiation when it changed the plea agreement to reflect two felony charges rather than one felony and one misdemeanor as originally written. We begin with Kopsi's right to counsel.

¶13 Criminal defendants are guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Art. I, §7 of the Wisconsin Constitution. *State v. Champlain*, 2008 WI App 5, ¶18, 307 Wis. 2d 232, 744 N.W.2d 889. Before allowing a criminal defendant 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. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). “Non-waiver [of counsel] is presumed” and “[t]he State has the burden of overcoming the presumption.” *Id.* at 204. To demonstrate a valid waiver of counsel, the circuit court should engage in a colloquy to ensure that the defendant “(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could [be] imposed.” *Id.* at 206.

¶14 The constitutional right to counsel extends to indigent defendants. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Kopsi notes that Wisconsin provides two ways an indigent criminal defendant can receive legal counsel. He or she may apply for a public defender pursuant to WIS. STAT. § 977.06(1m) or, if the person does not qualify for a public defender under the income limits set forth in WIS. STAT. § 977.07(2), he or she may apply for court-appointed counsel. A

court may appoint counsel even where the public defender's office has denied eligibility. *Dean*, 163 Wis. 2d at 513. A defendant seeking court-appointed counsel must demonstrate that he or she does not have sufficient assets to retain private counsel at the prevailing market rate. *See id.* at 514. Whether a defendant has the financial means to obtain counsel is a question of fact. *Id.* at 513. Whether a defendant's constitutional right to counsel has been violated is a question of constitutional fact, which we review independently. *See id.* at 511.

¶15 When the court decides whether to appoint counsel, it must inquire beyond the criteria mandated by the legislature for a public defender determination. *See id.* at 514. The court should consider "all relevant evidence presented by the defendant that is material to the defendant's present ability to retain counsel." *Id.* Here, the court contacted the public defender's office to ascertain the details of the denial of services. The court was informed that Kopsi had estimated the value of his minerals or gems at \$21,000. Upon that basis, the circuit court declined to appoint counsel. The court observed that an asset of that size would disqualify him from court-appointed counsel and acknowledged that it obtained "no other information beyond that in terms of Kopsi's request for counsel."

¶16 The State emphasizes that Kopsi waived his right to counsel when he chose not to wait for a decision on his application for appointed counsel and instead negotiated a favorable plea agreement directly with the State. It points out that the prosecutor advised Kopsi that he could not discuss the case with him unless Kopsi waived his right to counsel. Kopsi agreed to waive his right and negotiated a plea agreement on August 18, just four days after the preliminary hearing. Only after that, by letter dated August 22, did the court advise Kopsi that his application for court-appointed counsel had been denied. At the plea hearing,

Kopsi then confirmed on the record that he wished to proceed with the plea agreement without counsel. In the State's view, the circuit court was relieved of its duty to conduct a colloquy regarding indigence because Kopsi expressly stated that he wished to proceed pro se.

¶17 Waiver is the intentional relinquishment of a known right. *Milas v. Labor Ass'n of Wisconsin*, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997). We indulge in every reasonable presumption against waiver of a constitutional right. See *State v. Baker*, 169 Wis. 2d 49, 76, 485 N.W.2d 237 (1992). Under the specific facts of record here, we cannot agree that a waiver occurred. Kopsi had been in jail without counsel for twenty-two days when he first appeared in court on August 7, 2006.² Over the course of the proceedings, Kopsi twice sought public defender representation and applied once for a court-appointed attorney. He was unsuccessful each time. On his thirty-third day in jail, Kopsi requested and obtained a meeting with the assistant district attorney. There, Kopsi was advised that no resolution could be pursued unless he waived his right to counsel. Kopsi agreed and they worked out the details of the diversion agreement. It is significant that Kopsi agreed to waive his right to counsel not in court following a proper colloquy, but rather in a meeting with the prosecutor. None of the protections afforded under *Klessig* were available. After forty-five days in custody and three failed attempts to obtain counsel, Kopsi pled to two felony counts and entered into the diversion agreement.

² At his initial appearance, Kopsi stated that he had been in jail for thirty-five days. The records obtained from the Green Lake County Sheriff's Department and the Office of the Sheriff of Ontonagon County (where Kopsi resides) indicate that Kopsi was in custody from July 17 through August 30, 2006. The date of his initial appearance would have been his twenty-second day of incarceration.

¶18 We conclude that Kopsi's express waiver of counsel was not knowingly and voluntarily made. Kopsi advised the court of his urgent situation from the beginning. At his initial appearance on August 7, Kopsi told the court that he was "the only support [his] current family has," and that if he was not released from jail soon his "[his] fiancé and [his] three other children will be homeless." One week later, at the preliminary hearing, he informed the court that he had been pursuing public defender services but had been told he did not qualify. He then requested court-appointed counsel. Rather than inquire further, the court stated it was going forward because the hearing was not the correct time for Kopsi to apply for an attorney. At the end of the preliminary hearing, the court told Kopsi to "reconfer" with the public defender or, if he was ineligible, to apply for court-appointed counsel. Kopsi complied.

¶19 By the time of the plea taking, the court was aware that Kopsi made multiple attempts to obtain counsel. It obtained an express waiver from Kopsi on the record; however, the circumstances surrounding that waiver were readily apparent. Kopsi had family counting on him in Michigan and a quick resolution, in his view, was urgently needed. He had been jailed for forty-five days, and he had been denied counsel three times. It was, under the circumstances, the responsibility of the circuit court to inquire further to ascertain whether Kopsi was entitled to appointed counsel and whether his waiver was knowingly, intelligently and voluntarily made. *See Dean*, 163 Wis. 2d at 513. Further, the court was required to establish that Kopsi was competent to proceed pro se. *See Klessig*, 211 Wis. 2d at 203. The record reveals that Kopsi made statements indicating he was not competent to proceed on his own. At the preliminary hearing, when asked if he was prepared to proceed, Kopsi responded "I don't know what you mean by that. I mean, I don't really have a choice; do I?" The court asked Kopsi if he

would like to call witnesses, and Kopsi replied, “No ... I don’t know how these proceedings work. I don’t have an attorney so I am kind of between a rock and a hard place. I don’t know what is going on.”

¶20 The State responds that Kopsi got the benefit of his bargain; that is, an opportunity to avoid conviction if he complied with the diversion agreement. Perhaps, but that bargain was born of a Hobson’s choice: waive your right to counsel or no deal. We note that the plea agreement negotiation occurred while Kopsi’s request for counsel was pending. We cannot accept such a waiver as voluntary, particularly in the absence of any record of a proper in-court colloquy. In short, the record does not show that Kopsi intentionally relinquished his right to counsel. *See Milas*, 214 Wis. 2d at 9.

¶21 The State asks that, in the event we conclude the circuit court’s acceptance of Kopsi’s waiver was unreasonable, we remand for a nunc pro tunc indigence determination. If further judicial inquiry confirms that Kopsi knowingly, intelligently and voluntarily waived his right to counsel and was competent to proceed pro se, the State argues, he would not be entitled to withdraw his plea. We decline to remand for a nunc pro tunc determination. All that led up to Kopsi’s plea was tainted by the potentially unconstitutional deprivation of counsel. Further, sufficient facts of record persuade us that Kopsi may demonstrate a level of indigence that would support his eligibility for appointed counsel. His assets are gems, which must be liquidated (sold on eBay per his practice) to pay an attorney and the value of which may range between \$3,000 and \$20,000; his doctor testified that finding other employment was unlikely due to Kopsi’s health problems; his monthly expenses include a mortgage payment, an auto loan, and child support; his income disclosure includes his fiancé’s monthly *public assistance* stipend of \$600 and food stamps.

¶22 Kopsi raises additional issues stemming from the plea agreement, the plea taking, and the postconviction proceedings. Because we reverse and remand for new proceedings, we need not reach the other issues presented. *See Barber v. Weber*, 2006 WI App 88, ¶19, 292 Wis. 2d 426, 715 N.W.2d 683.

CONCLUSION

¶23 Kopsi had a constitutional right to counsel that was unreasonably denied by the circuit court. The record lacks the required colloquy from which we might have determined that Kopsi's express waiver of that right was knowingly, intelligently and voluntarily made and that he was competent to proceed pro se. Furthermore, the record does contain several facts that would tend to support Kopsi's right to court-appointed counsel. Accordingly, we reverse the judgment and the order denying postconviction relief and remand for further proceedings, beginning with a hearing to determine whether Kopsi is eligible for appointed counsel.

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

Not recommended for publication in the official reports.

