COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2115-CR **Cir. Ct. No. 2007CM1020**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRY F. CHILESKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Reversed.*

¶1 DYKMAN, J.[1] Harry Chileski appeals from a judgment convicting him of battery and an order denying his postconviction motion. Chileski argues

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that he did not voluntarily waive his right to counsel when he appeared without legal representation on the date of his trial and said he wanted an attorney but that he understood it was too late for him to obtain one. We agree that the record does not reflect that Chileski voluntarily waived his right to counsel. We also conclude that Chileski did not forfeit his right to counsel through his conduct. We reverse.[2]

Background

¶2 The following facts are undisputed. On October 12, 2007, the State charged Chileski with one count of misdemeanor battery based on an altercation between Chileski and a Domino's Pizza delivery driver. Chileski appeared pro se at the bond hearing, and pled not guilty. The court informed Chileski of his trial rights, including the right to a lawyer and to be provided a lawyer if he could not afford one. Chileski stated that he understood his rights. On November 30, 2007, the court held a pre-trial conference, during which Chileski refused a plea deal and stated he wanted a trial. The court set the jury trial for January 30, 2008.

¶3 On January 30, 2008, Chileski appeared for his trial without legal representation. The court engaged in the following exchange with Chileski:

> Q: You wish to represent yourself?
>
> A: Yes, sir.
>
> Q: You understand representing yourself you are at somewhat of a disadvantage because you do not know the rules of evidence and the rules of procedure and so on and so forth? Do you understand that?
>
> A: Yes.

[2] Because we conclude that the record does not reflect that Chileski voluntarily waived or forfeited his right to counsel, we need not reach Chileski's other claims of trial court error.

> Q: ….
>
> Now, Mr. Chileski, you do understand you do have a Constitutional Right to have an attorney here to represent you?
>
> A: Yes, sir.
>
> Q: You understand the Public Defender's office will appoint an attorney, if you are unable to get your own attorney?
>
> A: Yes, sir.
>
> Q: Do you understand if you're not eligible for Public Defender appointment, the Court could appoint one for you?
>
> A: No. I didn't understand that, but I do now.
>
> Q: Would you like to have an attorney or do you want to have an attorney?
>
> A: I wanted to have an attorney here to represent me, Your Honor. I tried to get a hold of one. It was too late. My financial situation wouldn't allow it. The attorney I spoke to said it was too late. It was too little time. When I tried to get an adjournment it was denied. I had to be here for trial.
>
> Q: You can't start trying to find a lawyer—
>
> A: I understand, Your Honor. It was more of a financial—
>
> Q: You needed to be doing something about this. It was sent out in November almost three months ago. That's the time, whether it's a financial issue or not. That's the time to be looking for an attorney. And if that's the—if you can't get one, that's the time. Look, you can't be doing it—
>
> A: Yes, sir. I understand that. That's why I chose to represent myself.

The court then conducted a colloquy with Chileski to ensure he understood the benefits of obtaining legal counsel. The court then engaged in this exchange with Chileski:

> Q: Do you have any questions at this time about the right to counsel?
>
> A: No, sir.
>
> ….
>
> Q: All right. I want you to—I read through this whole form with you. It's a form of the waiver of right to counsel. Just sign on the second page acknowledging it's been read to you and explained to you, the form I read.

Chileski then signed the waiver of his right to an attorney. Following trial, the jury returned a guilty verdict and the court entered a judgment of conviction. Chileski sought postconviction relief, which the court denied. Chileski appeals.

Standard of Review

¶4 Whether a defendant was deprived of his constitutional right to counsel is a question of constitutional fact, which we review de novo. ***State v. Coleman***, 2002 WI App 100, ¶10, 253 Wis. 2d 693, 644 N.W.2d 283.

Discussion

¶5 Chileski contends that he did not voluntarily waive his right to counsel. He argues that the record reveals that he asserted on the day of trial that he wanted a lawyer to represent him, but that he believed that it was too late for him to obtain one. He claims that he was unaware that the court could have appointed an attorney for him even if he was ineligible for public defender representation. Thus, Chileski asserts that the record establishes that he decided to represent himself because he believed that was his only option, not as a deliberate choice to proceed pro se. We agree.

¶6 We begin with the basic premise that "[a] criminal defendant in Wisconsin is guaranteed the right to counsel by both article I, section 7 of the

Wisconsin Constitution and the Sixth Amendment to the United States Constitution." ***Coleman***, 253 Wis. 2d 693, ¶11. Thus, "[w]hen a defendant elects to proceed without counsel, the circuit court must insure that the defendant … has knowingly, intelligently and voluntarily waived the right to counsel." ***Id.***, ¶13. To establish a knowing, intelligent, and voluntary waiver, the court "must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel; (2) was aware of the challenges and disadvantages of self-representation; (3) was aware of the seriousness of the charges; and (4) was aware of the general range of penalties that could be imposed."[3] ***Id.*** (citing ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)). If a court does not conduct an adequate colloquy to establish a valid waiver, nonwaiver is presumed, and the State has the burden to overcome that presumption by clear and convincing evidence. ***Klessig***, 211 Wis. 2d at 204, 206-07.

¶7 We agree with the State that the court conducted a colloquy with Chileski in accord with ***Klessig***. The problem is that the colloquy revealed that Chileski did not, in fact, make "a deliberate choice" to proceed pro se. When the court asked Chileski whether he wanted a lawyer, Chileski stated:

> I wanted to have an attorney here to represent me, Your Honor. I tried to get a hold of one. It was too late. My financial situation wouldn't allow it. The attorney I spoke to said it was too late. It was too little time. When I tried to get an adjournment it was denied. I had to be here for trial.

[3] Because we conclude that Chileski did not voluntarily waive his right to counsel, we need not address whether the court fulfilled the second prong of its obligation following a defendant's election to proceed pro se. *See* ***State v. Coleman***, 2002 WI App 100, ¶13, 253 Wis. 2d 693, 644 N.W.2d 283 (after determining defendant has validly waived his or her right to counsel, court must determine defendant "is competent to proceed without counsel").

The court responded by telling Chileski:

> You can't start trying to find a lawyer—
>
> ….
>
> You needed to be doing something about this. It was sent out in November almost three months ago. That's the time, whether it's a financial issue or not. That's the time to be looking for an attorney. And if that's the—if you can't get one, that's the time. Look, you can't be doing it—

Chileski then stated that that was the reason he decided to represent himself.

¶8 We cannot interpret this exchange as establishing Chileski's "deliberate choice" to represent himself. Chileski stated that he wanted a lawyer but that he understood that it was too late for him to obtain one. He said that he only became aware that an attorney could have been appointed for him when he appeared at trial. Thus, the first step in the ***Klessig*** colloquy has not been met. The record does not reveal that Chileski voluntarily waived his right to counsel.[4]

¶9 Finally, although the State argues only that Chileski voluntarily waived his right to counsel, we turn to whether the record supports a finding that Chileski forfeited his right to counsel through his conduct. *See* ***State v. McMorris***, 2007 WI App 231, ¶23, 306 Wis. 2d 79, 742 N.W.2d 322 (even if defendant does not validly waive his or her right to counsel, he or she may forfeit that right "not by virtue of an express verbal consent from the defendant, but rather by operation

[4] We decline to address the State's arguments concerning the other requirements of a ***Klessig*** colloquy, involving the defendant's understanding of the charges, penalties, and disadvantages of proceeding without counsel. Because the colloquy did not establish that Chileski made a deliberate choice to proceed pro se, his understanding of the consequences of doing so is irrelevant.

of law because the defendant has deemed by his or her own actions that the case proceed accordingly" (citation omitted)). We do so because, during the colloquy on the day of trial, the court told Chileski that he had an obligation to pursue counsel prior to his trial date.[5] To the extent that this statement could be read as a finding that Chileski had forfeited his right to counsel through his conduct, we conclude that the record does not support that finding.

¶10 "[T]he right to counsel may be [forfeited] by a defendant who fails to retain counsel within a reasonable time when he is financially able to do so." ***Keller v. State***, 75 Wis. 2d 502, 509, 249 N.W.2d 773 (1977). However, "[i]n a forfeiture determination, the court must conclude that the defendant's conduct is intended to frustrate the efficient progression of the case." ***McMorris***, 306 Wis. 2d 79, ¶21. The supreme court has therefore recommended that circuit courts take the following steps to determine whether a defendant has forfeited his or her right to counsel:

> (1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel has been forfeited;
>
> (2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;

[5] Chileski argues that when the court told him he should have sought counsel earlier, the court erroneously exercised its discretion by denying his motion for a continuance to obtain counsel. At the postconviction motion hearing, the court specifically found that Chileski never requested a continuance, and stated it would have granted him a continuance if he had asked for one. However, we have said that when the issue was the presence of counsel rather than substitution of counsel, "the trial court's obligation … was that of determining on the record whether or not the defendant, by his actions, had indeed [forfeited] his right to any counsel**."** ***Keller v. State***, 75 Wis. 2d 502, 511, 249 N.W.2d 773 (1977). We therefore need not address whether or not Chileski requested a continuance or, if he did, whether the court properly exercised its discretion in denying that request.

> (3) make a clear ruling when the court deems the right to counsel to have been forfeited; and
>
> (4) make factual findings to support the court's ruling.

Id., ¶24 (citation omitted).

¶11 On the record before us, there is no indication that Chileski appeared without counsel to intentionally frustrate the progression of the case. Additionally, the record lacks evidence of the recommended procedure to support a finding of forfeiture, such as warnings that if Chileski appeared without representation on the date of trial he would lose his right to counsel or a specific finding by the court indicating when Chileski had forfeited that right through his conduct. As the supreme court has explained:

> We can fully understand and appreciate the frustrations of a trial judge when confronted with a situation such as presented in this case. The case had been set for a day-certain trial date three months in advance. On the morning of trial, the jury panel was present, along with all of the State's witnesses, and the necessary supporting court personnel. Under these circumstances, where the defendant appeared without counsel, the trial court was confronted with a difficult situation and there are many instances in which the trial court would be wholly justified in requiring the defendant to proceed with trial. This is not such a case, however, because the record before us contains no evidence that the [defendant's conduct] was … for the purpose of delay or to manipulate the right to counsel so as to obstruct the orderly procedure for trials or to interfere with the administration of justice.

Keller, 75 Wis. 2d at 506. Accordingly, we conclude that Chileski did not waive or forfeit his right to counsel, and therefore reverse.

By the Court.—Judgment and order reversed.

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