COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0325-CR **Cir. Ct. No. 01-CM-1876**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN T. FINK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: T.J. GRITTON, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, P.J.[1] Steven T. Fink appeals from a judgment of conviction and an order denying his motion for postconviction relief. Without representation of counsel, Fink pled no contest to a charge of disorderly conduct

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

contrary to WIS. STAT. § 947.01. Fink argues that the circuit court erred in denying his postconviction motion seeking to withdraw his plea because the circuit court failed, pursuant to ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), to advise him of the difficulties and disadvantages of proceeding without counsel.

¶2 The circuit court conceded at the postconviction motion hearing, and the State similarly concedes on appeal, that the court failed to expressly address the difficulties and disadvantages of self-representation with Fink. Because the record otherwise fails to establish that Fink was made aware of these disadvantages, we reverse the judgment and the order denying his postconviction request to withdraw his plea and remand for an evidentiary hearing as required by ***Klessig***.

¶3 Appearing pro se, Fink entered a no contest plea to disorderly conduct on October 17, 2001. Prior to entering his plea, the circuit court informed him that if he could not afford an attorney, one would be provided to him through the public defender's office. Fink indicated that he wanted to plead no contest and "just get this over with." The court then inquired as to whether Fink had spoken to the prosecutor, Assistant District Attorney Edmund Jelinski. The prosecutor was not present at that time so the court gave Fink the option of entering a not guilty plea until he had a chance to meet with the prosecutor. Fink chose instead to wait for the prosecutor to arrive before entering a plea. After Fink spoke with the prosecutor, the court recalled his case.

¶4 The prosecutor represented to the court that he had conferred with Fink and that Fink was willing to enter a no contest plea based on the State's recommendation of an eighteen-month period of probation, alcohol and drug

assessment and anger management counseling. Fink indicated his agreement with the prosecutor's statement and his willingness to proceed. The court again asked Fink if he wished to proceed without an attorney. Fink indicated that he did.

¶5 The circuit court conducted a plea colloquy during which it informed Fink of the maximum penalties and elements of the offense and his waiver of his constitutional rights at trial. The circuit court also inquired as to Fink's level of education, health, English language abilities, citizenship and use of medication, drugs and alcohol. Before accepting Fink's plea, the circuit court inquired, "[A]re you willing to continue after everything we have discussed without an attorney?" Fink responded, "Yes."

¶6 On January 4, 2002, Fink filed a postconviction motion to withdraw his no contest plea. Fink argued that contrary to the supreme court's holding in ***Klessig***, the circuit court accepted his waiver of counsel without ascertaining that he understood the potential benefits of counsel and pitfalls of self-representation. *See* ***Klessig***, 211 Wis. 2d at 206.

¶7 Following a hearing on January 22, 2002, the circuit court denied Fink's motion. The circuit court found:

> [U]nder the circumstances based on everything that was explained to him that day in the record, that although the question wasn't put to him directly, I clearly think that he understood the advantages and disadvantages of going ahead without counsel based upon his education [two years of college], based upon the plea colloquy, based upon every opportunity that I gave him to be represented. Like I said at the end again I explained that to him; and as a result, I am going to deny your motion ….

Fink appeals.

¶8 Whether a defendant has knowingly, intelligently and voluntarily waived his or her 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. "Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." ***Id***. The State bears the burden of overcoming the presumption of nonwaiver. ***Id***.

¶9 Our supreme court held in ***Klessig*** that the circuit 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 difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges against him or her; and (4) was aware of the general range of penalties that could have been imposed on him or her. ***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***. Instead, the circuit court must conduct an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent and voluntary. ***Id***. at 206-07.

¶10 Fink's challenge on appeal is limited, as it was before the circuit court, to the second prong—whether he was aware of the difficulties and disadvantages of self-representation. ***Id***. at 206. The State concedes that the circuit court did not directly inquire as to whether Fink was aware of the difficulties or disadvantages of self-representation. However, the State argues that the "totality of the evidence" reflects that Fink was made aware of the difficulties and disadvantages of self-representation. In so arguing, the State relies in part upon the thorough plea colloquy conducted by the circuit court and the prosecutor's statement made at the postconviction motion hearing that during plea

negotiations he had discussed with Fink the disadvantages of proceeding without counsel.

¶11 While we agree with the State that the circuit court conducted a thorough plea hearing and clearly satisfied three of the four ***Klessig*** prongs, we conclude that there is insufficient evidence in the record that Fink was made aware of the disadvantages of self-representation. Although the prosecutor represented his "belief" that he discussed such matters with Fink, neither the conversation nor the prosecutor's recollection of the details of that discussion is a part of the record.

¶12 In arriving at our decision, we acknowledge that there are circumstances in which the absence of a formal colloquy under ***Klessig*** is not fatal. *See* ***State v. Ruszkiewicz***, 2000 WI App 125, ¶30, 237 Wis. 2d 441, 613 N.W.2d 893, *review denied,* 2000 WI 102, 237 Wis. 2d 259, 618 N.W.2d 749 (Wis. July 27, 2000) (No. 99-1198-CR). However, it must still be evident from the exchanges between the defendant and the circuit court that the defendant was made aware of the difficulties of proceeding without counsel.[2] *See* ***id***. at ¶32.

¶13 Here, there is evidence only that Fink was given the opportunity on more than one occasion to obtain an attorney; there is no evidence that he had been warned in any fashion as to the difficulties of proceeding without one. Despite the otherwise thorough colloquy conducted by the circuit court with Fink,

[2] Although the trial court in ***State v. Ruszkiewicz***, 2000 WI App 125, ¶32, 237 Wis. 2d 441, 613 N.W.2d 893, *review denied,* 2000 WI 102, 237 Wis. 2d 259, 618 N.W.2d 749 (Wis. July 27, 2000) (No. 99-1198-CR), did not engage in a formal colloquy with the defendant, during the course of several exchanges with him, it urged the defendant to obtain an attorney so as to avoid "legal missteps" and advised him that "lawyers are able to determine defenses for you that you may not be aware of based … upon their education and their experience and their training." These kinds of cautions and advice were not provided to Fink in this case.

pursuant to ***Klessig*** we have no choice but to remand for an evidentiary hearing at which the State will be required to prove by clear and convincing evidence that Fink's waiver of counsel was knowing, intelligent and voluntary. ***Klessig***, 211 Wis. 2d at 207. If the State is able to do so, Fink's conviction shall be reinstated; if the State is unable to do so, Fink will be entitled to withdraw his plea. ***Id***.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.