

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2002

Cornelia G. Clark
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. 02-0527

Cir. Ct. No. 99-CM-330

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM GUNDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Trempealeau County:
JOHN A. DAMON, Judge. *Affirmed.*

Before, Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. William Gunderson appeals an order denying his postconviction motion to vacate his misdemeanor conviction for violating a domestic abuse injunction, contrary to WIS. STAT. § 813.12(8)(a). Gunderson argues that the circuit court should have required him to appear in person for sentencing rather than permitting him to appear by telephone. See WIS. STAT.

§ 971.04(1)(g). However, Gunderson's attorney appeared in person while Gunderson was on the telephone. We conclude that while the court erred by not receiving a written authorization from Gunderson, the error was harmless. We therefore affirm the judgment.

BACKGROUND

¶2 Gunderson was charged with one count of violating a domestic abuse injunction.¹ He pled no contest. At the plea and sentencing hearing, Gunderson, who was in prison serving a four-year sentence for theft, appeared by telephone. His attorney appeared in person.² At no time did Gunderson object to appearing by telephone or to his attorney appearing on his behalf.

¶3 The circuit court conducted a plea colloquy with Gunderson. The court found that Gunderson's plea was made knowingly, intelligently, and voluntarily, accepted his plea and found him guilty.

¶4 The circuit court proceeded to sentencing. Gunderson's attorney argued for a lenient sentence and asked the circuit court to impose a sentence concurrent with to Gunderson's four-year prison sentence. Gunderson was also allowed to address the court. The court imposed a six-month sentence to run consecutive to his current sentence.

¹ Gunderson was charged as a habitual criminal offender pursuant to WIS. STAT. § 939.62(1)(a).

² For purposes of WIS. STAT. § 971.04, appearing by telephone is not the equivalent of appearing in person. In *State v. Peters*, 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, ¶¶18, 22, 244 Wis. 2d 470, 628 N.W.2d 797, we concluded that the plea and sentencing by closed-circuit television violated the statute.

¶5 Gunderson filed a postconviction motion seeking to vacate the judgment of conviction, arguing that he was required to be present at sentencing under WIS. STAT. § 971.01(1)(g). The circuit court denied the motion.

STANDARD OF REVIEW

¶6 This issue involves the interpretation of WIS. STAT. § 971.04. The construction of a statute and its application to a set of facts presents a question of law that we review independently of the circuit court. *State v. Vennemann*, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993).

DISCUSSION

¶7 WISCONSIN STAT. § 971.04(1) specifies at what proceedings a defendant "shall be present[.]"³ Under § 971.04(1)(g), a defendant shall be present at "the imposition of sentence." Gunderson argues that the circuit court erred by

³ WISCONSIN STAT. § 971.04(1) provides:

Defendant to be present. (1) Except as provided in subs. (2) and (3), the defendant shall be present:

- (a) At the arraignment;
- (b) At trial;
- (c) During voir dire of the trial jury;
- (d) At any evidentiary hearing;
- (e) At any view by the jury;
- (f) When the jury returns its verdict;
- (g) At the pronouncement of judgment and the imposition of sentence;
- (h) At any other proceeding when ordered by the court.

permitting him to appear by telephone for sentencing. Citing *State v. Koopmans*, 210 Wis. 2d 670, 672-73 n.1, 563 N.W.2d 528 (1997), Gunderson contends that § 971.04(1)(g) requires a defendant to be present at sentencing.⁴

¶8 In *Koopmans*, the supreme court held that as long as WIS. STAT. § 971.04(2) and (3) do not apply, a “defendant may not waive his or her statutory right to be present at sentencing even if the waiver is made knowingly and voluntarily.” *Koopmans*, 210 Wis. 2d at 672-73. Subsection (2) permits a defendant charged with a misdemeanor to be excused from attending any or all proceedings and to authorize, in writing, an attorney to act on his or her behalf.⁵ *Id.* at 677.

¶9 WISCONSIN STAT. § 971.04(2) did not apply in *Koopmans* because Koopmans was charged with a felony. *Id.* at 677. Here, Gunderson was charged

⁴ Gunderson makes two additional arguments. First, Gunderson argues that he had fired his attorney and the attorney no longer represented him during the plea and sentencing hearing. However, Gunderson did not object to the attorney’s representation at the plea and sentencing hearing. Nor did Gunderson claim that the attorney was not representing him or had no authority to act on his behalf. In fact, the circuit court questioned Gunderson:

THE COURT: And Mr. Lokken’s your attorney; and prior to today, you talked to him a little bit. And so you understand your right to an attorney, and you’ve taken advantage of that, haven’t you?

THE DEFENDANT: Yes, Sir.

Second, Gunderson argues that he was denied his right to effective assistance of counsel. However, no *Machner* hearing was held. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We have reviewed the record submitted on appeal and conclude that there is no prejudice to Gunderson because any error counsel may have committed was harmless.

⁵ WISCONSIN STAT. § 971.04(2) reads as follows: “A defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his or her behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings.”

with a misdemeanor. Therefore, subsection (2) applies. Gunderson's argument fails because, unlike a felony charge where a defendant's presence is absolutely required, a defendant charged with a misdemeanor may waive his or her presence at sentencing.

¶10 However, WIS. STAT. § 971.04(2) does require a defendant's written authorization in order for an attorney to appear at sentencing on a defendant's behalf. Gunderson did not give written authorization. Therefore, the circuit court erred by not requiring Gunderson to be physically present in the courtroom.

¶11 Nevertheless, that does not end our inquiry because violation of the right to be present under WIS. STAT. § 971.04 is subject to a harmless error analysis. *State v. Peterson*, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998). An error is harmless if it does not affect the substantial rights of the defendant. *State v. Harris*, 229 Wis. 2d 832, 840, 601 N.W.2d 682 (Ct. App. 1999).

¶12 We have examined the record to determine whether the circuit court violated a substantial right by not procuring Gunderson's written authorization under WIS. STAT. § 971.04(2). To begin, we state the obvious: Gunderson was not absent from the proceedings; he was present on the telephone and, indeed, participated in the hearing. The court conducted a plea colloquy with Gunderson and found that he knowingly, voluntarily and intelligently waived his rights. Before imposing sentence, the circuit court gave Gunderson and his attorney an opportunity to speak. Gunderson stated that he had deep remorse for what happened and that he would be going through anger management classes. At no time during the hearing did Gunderson object to appearing by telephone or to his attorney appearing on his behalf.

¶13 Gunderson has identified no way in which his telephone appearance affected his sentence. Based on our review, we conclude that Gunderson was not deprived of a substantial right. Therefore, the absence of a written authorization to have his attorney appear on his behalf amounted to harmless error.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

