

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 3, 2003**

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. 02-2766-CR**

**Cir. Ct. No. 01-CF-309**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFREY TURNER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey Turner appeals a judgment convicting him of second-degree sexual assault and bail jumping. He also appeals an order denying his motion for a new trial. He argues that his waiver of counsel was invalid because the court did not engage in the type of colloquy required by *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), that Turner was not

competent to represent himself and the court should have appointed an attorney when it became apparent that Turner could not present his alibi defense. We reject these arguments and affirm the judgment and order.

¶2 Turner was charged with second-degree sexual assault, bail jumping and burglary. At a trial in which Turner represented himself, the jury acquitted him of the burglary charge and convicted him of the other offenses.

¶3 Turner was initially represented by Attorney Brian Wright who moved to withdraw shortly after the initial appearance because Turner wanted a different attorney. Wright was succeeded by Attorney Peter Morin who also asked to withdraw because Turner filed a professional responsibility complaint against him in another case. Turner told the court that he did not object to Morin's withdrawal. The court informed Turner that the public defender's office indicated that it would deny any request for another appointment. Turner stated that he still wanted Morin to withdraw. The court established through a colloquy with Turner that Turner was "comfortable" representing himself and that no one had threatened him into giving up his right to an attorney. Morin advised the court that the case would be "somewhat complicated" because Turner intended to present an alibi defense. Morin's private investigator had not been able to locate the alibi witnesses and Turner would be at a disadvantage attempting to locate those witnesses without counsel. The court informed Turner that he could still apply for a court-appointed attorney through the clerk of court's office. Turner stated that he understood this, he knew that there was substantial work to be done, and he asked Morin to draft a notice of alibi before concluding his representation.

¶4 At the next hearing, the court again reminded Turner that he had the right to an attorney and that, if he applied to the clerk's office and met the

indigency status, an attorney would be appointed for him. Turner stated that he had not requested court-appointed counsel and did not intend to. When asked how he was going to contact witnesses, he replied that he would rely on letters. The court again reminded Turner that appointed counsel could assist him in contacting witnesses.

¶5 Shortly before trial, the prosecutor requested that the court conduct a *Klessig* hearing to make a record on Turner's appreciation and understanding of the criminal justice system. On the morning of trial, Turner again reiterated that he had chosen to represent himself knowing that court-appointed counsel was available. Turner acknowledged that he understood the charges against him and that he faced prison time for these offenses. The court again reminded him that an attorney could assist him in ways that he might not be aware of, including court room procedure, investigation, examination of witnesses and legal issues. Turner reiterated that he wanted to represent himself.

¶6 Turner asked no questions during jury selection and called one other witness, a booking officer from the jail. His own testimony was very brief. He explained that he was "unsuccessful in detaining" his alibi witnesses.

¶7 When a defendant wants to proceed without counsel, the trial court must insure that he has knowingly, intelligently and voluntarily waived his right to counsel and that he is competent to proceed pro se. *Klessig*, 211 Wis. 2d at 203. If a defendant properly waives counsel and is competent to do so, the court must allow him to represent himself. *Id.* at 204. To establish proper waiver of counsel, the court must establish 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 charges against him and

(4) was aware of the general range of penalties that could be imposed. *Id.* at 205. When determining the defendant's competency, the court must consider his intelligence, education, literacy, fluency in English, and any physical or psychological disabilities that may affect his ability to communicate to the jury. *Id.* at 212. The competency determination should not prevent persons of average ability and intelligence from representing themselves. *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980).

¶8 Contrary to Turner's argument, it is not necessary for the court to conduct a single colloquy to establish all of the factors that relate to a valid waiver of counsel. Rather, the court may rely on the record as a whole to determine whether Turner's waiver of counsel was knowing, intelligent and voluntary and whether he was competent to represent himself. *See State v. Ruszkiewicz*, 2000 WI App 125, ¶30, 237 Wis. 2d 441, 613 N.W.2d 893. The record as a whole shows that, before trial, Turner repeatedly made a deliberate choice to proceed without counsel knowing that counsel could be appointed to assist him, that it would be difficult to present his defense without counsel and that he faced serious charges with substantial prison sentences at stake. Turner's competency was established by his ability to read, write and speak fluent English, good grammar, and well-written motions. He had previously successfully defended himself and succeeded in persuading the jury to acquit him on the burglary charge. Turner's failure to locate the alibi witnesses does not demonstrate lack of competency to represent himself. His attorney's investigators could not locate the alibi witnesses. The record does not establish that counsel could have located any witnesses who could have provided a valid alibi defense.

¶9 The trial court properly exercised its discretion when it did not appoint counsel for Turner. Although he presented a minimal defense to the

sexual assault charge, he competently cross-examined the victim and there is no reason to believe the presence of counsel would have added to the defense. The trial court reasonably protected Turner's constitutional right to represent himself.

*By the Court.*—Judgment and order affirmed.

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

