

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 12, 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. 02-3007-CR**

**Cir. Ct. No. 01-CT-44**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**ANDREW R. KNAUER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marquette County:  
RICHARD O. WRIGHT, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, P.J.<sup>1</sup> Andrew Knauer was charged with operating a motor vehicle while intoxicated (OWI) contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(d). The complaint alleged that this was his fourth OWI offense. The State appeals the circuit court's order precluding consideration of one of the three

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

prior convictions, entered on February 29, 2000, on the ground that Knauer did not knowingly, intelligently, and voluntarily waive his right to counsel in that case.<sup>2</sup> We conclude that under *State v. Polak*, 254 Wis. 2d 585, 646 N.W.2d 845 (2002), the circuit court in the prior case conducted an adequate colloquy when it supplemented the oral colloquy with references to the waiver of right to counsel and waiver of rights forms. Accordingly, we reverse the circuit court order barring consideration of the February 29, 2000 conviction and remand for further proceedings.

¶2 In the prior case, the following exchange took place at the plea and sentencing hearing:

THE COURT: Mr. Knauer, on the back of the Plea Questionnaire, there's sections about—there's a section about your right to a lawyer. Do you understand that?

KNAUER: Yes.

THE COURT: Did you read it?

KNAUER: Yes.

THE COURT: Do you understand everything in that section?

KNAUER: Yes.

THE COURT: Do you wish to go ahead without a lawyer?

KNAUER: Yes.

The form that the circuit court referred to, and Knauer signed, was “Rights to Appeal & Waiver of Counsel,” which reads in pertinent part as follows:

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<sup>2</sup> We granted leave to appeal this interlocutory order.

RIGHT TO AN ATTORNEY & WAIVER

This is a CRIMINAL case. Therefore, you have the RIGHT TO HAVE AN ATTORNEY at any and all stages of the criminal justice process. An attorney can advise you as to your legal rights and options, explain procedures to you, assist you in negotiating a settlement of the case, investigate and explore possible defenses, prepare for and conduct your defense at trial, file motions and appeals, and assist you at sentencing if you are convicted. If you are determined to be indigent by the Public Defense and you cannot afford an attorney, an attorney will be appointed for you at the State expense. If you disagree with the indigency determination of the State Public Defender you may ask for a review of that decision with the judge assigned to your case. If the judge determines that you are indigent, determination of the State Public Defender to represent you or may appoint or may appoint a private attorney for you at County expense.

I have read and I do understand my right to an attorney and I hereby voluntarily, freely, and intelligently waive that right at this time.

The court also continued with the following colloquy:

THE COURT: Let me show you the front of the plea forms. Did you read those?

KNAUER: Yes.

THE COURT: Do you understand the rights at the top you are giving up and all of the other information?

KNAUER: Yes.

THE COURT: Do you have any questions about those rights?

KNAUER: No, Sir.

The plea form that the circuit court referred to, which Knauer signed, reads in pertinent part as follows:

PLEA QUESTIONNAIRE/WAIVER OF RIGHTS

*Constitutional Rights*

I understand that by entering this plea, I give up the following constitutional rights:

I give up my right to a trial.

....

*Understandings*

....

I understand that the judge... may impose the maximum penalty. The maximum penalty I face upon conviction is: 2 years jail and \$4000 fines or both.

I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: 30 days + \$600 [plus court costs].

Based on Knauer's plea, the court in the prior proceeding entered a judgment of conviction for OWI on February 29, 2000.

¶3 Knauer moved the circuit court in this case to preclude consideration of the February 29, 2000 conviction, arguing that he did not knowingly, intelligently, and voluntarily waive his right to counsel.<sup>3</sup> He asserted that he did not have counsel when he entered a plea to that conviction, and, based on the requirements of *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), there was not a proper colloquy. The court granted the motion, concluding that the colloquy conducted in the prior case did not meet the requirements of *Klessig* and therefore Knauer's right to counsel had been violated.

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<sup>3</sup> A defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense. *State v. Baker*, 169 Wis. 2d 49, 59, 485 N.W.2d 237, 241 (1992).

¶4 The decision whether a defendant knowingly, intelligently, and voluntarily waived the right to counsel requires the application of constitutional principles to the facts of the case, which we review independently of the trial court. *Polak*, 254 Wis. 2d 585, 592-93, 646 N.W.2d 845. Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent, and voluntary, and the State has the burden of overcoming the presumption of nonwaiver. *Id.*

¶5 In *Klessig*, the supreme court mandated a trial court to conduct a colloquy in every case where a defendant seeks to proceed pro se in order to establish a knowing, intelligent, and voluntary waiver of the right to counsel. *Klessig*, 211 Wis. 2d at 206. To prove a valid waiver, a 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, and (4) was aware of the general range of penalties that could have been imposed on him. *Id.* 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.*

¶6 In *Polak*, 254 Wis. 2d 585, we considered the *Klessig* requirements in a situation where the circuit court referred to a signed waiver worded similarly to that Knauer signed. (*Polak* was decided shortly before the circuit court in this case ruled on Knauer's motion and was not brought to the circuit court's attention.) We concluded in *Polak* that the circuit court's oral colloquy with defendant, supplemented by the signed waiver of right to attorney form, adequately demonstrated that defendant's waiver of right to counsel was knowing, intelligent, and voluntary. *Polak*, 254 Wis. 2d at 600-01. We stated "[w]e place particular emphasis on the written waiver of counsel form, used in conjunction

with the oral colloquy, because that form unequivocally states [defendant's] awareness of the assistance an attorney could provide and that an attorney might discover helpful things unknown to [defendant].” *Id.* at 600.

¶7 The State contends that the circuit court’s colloquy in Knauer’s prior case satisfied the *Klessig* requirements as applied in *Polak*. Knauer responds the colloquy was not sufficient because the court failed to caution him orally about self-representation and therefore failed to ensure that he was aware of the difficulties and disadvantages of self-representation. However, the court specifically referred to the section regarding self-representation and asked if Knauer understood it, and Knauer said he did. That section plainly states the advantages of having a lawyer, and it is self-evident that one does not have these advantages if one does not have a lawyer.

¶8 Following *Polak*, we conclude that the court’s oral colloquy with Knauer, supplemented by references to the right to an attorney waiver and waiver of rights forms read and signed by Knauer, demonstrates that Knauer understood the difficulties and disadvantages of self-representation, and also satisfies the other three *Klessig* requirements. We therefore reverse the circuit court order precluding consideration of the February 29, 2000 conviction and remand for further proceedings.

*By the Court.*—Order reversed and cause remanded.

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



