

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 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. 02-3188-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02-CT-51

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK A. DENNINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
THOMAS J. GALLAGHER, Reserve Judge. *Reversed and cause remanded with
directions.*

¶1 CANE, C.J.¹ Mark Denninger appeals a judgment entered on a no
contest plea to operating while intoxicated, third offense. Denninger sought to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

dismiss the penalty enhancer for his offense by collaterally attacking his waiver of counsel for one of his prior OWI convictions. The trial court determined the prior waiver was valid and denied the motion. We conclude the trial court erred and therefore reverse and remand the matter for resentencing.

BACKGROUND

¶2 Denninger was charged in Bayfield County with third offense OWI in May 2002. Denninger moved to dismiss the third offense penalty enhancer, arguing he did not knowingly waive his right to counsel for a 1993 conviction for OWI in Eau Claire County. Specifically, he claimed he was not aware of the disadvantages and difficulties of self-representation. In support of his motion, Denninger submitted the transcript from the 1993 plea hearing. This transcript reads in relevant part:

THE COURT: How old are you?

DEFENDANT: Twenty-five.

THE COURT: How far have you gone in school?

DEFENDANT: I've got a B.S. in mechanical engineering. I received that last May.

THE COURT: Do you wish to give up your constitutional right to an attorney?

DEFENDANT: Yes.

THE COURT: What plea do you wish to enter to the charge of driving a motor vehicle while under the influence of an intoxicant?

DEFENDANT: Guilty.

THE COURT: Has anybody placed any unfair pressure upon you to do that?

DEFENDANT: No.

THE COURT: Do you understand that if you are indigent and would like to have an attorney, an attorney is available through the State Public Defender's office?

DEFENDANT: Yes.

THE COURT: Has anybody told you that you should come in here without an attorney?

DEFENDANT: No.

THE COURT: Have any promises been made to you that have induced you to plead guilty?

DEFENDANT: No.

THE COURT: Do you understand that by pleading guilty you're giving up a number of constitutional rights besides that of your right to be represented by an attorney. You're giving up your right to a jury trial. At a jury trial, all 12 jurors must agree upon the verdict. Do you understand that?

DEFENDANT: Yes.

THE COURT: You're giving up your constitutional right to be able to confront your accusers. That is, you're giving up your right to cross-examine anyone who would testify against you. You're giving up your constitutional right to not incriminate yourself. If your plea is received, you will be incriminated. Otherwise you have a right to remain silent or to plead not guilty. If you do either one of those options, the State has the burden of proving to a jury beyond a reasonable doubt that on January 23, 1993, in Eau Claire, you drove a motor vehicle and that when you drove the motor vehicle on a public roadway you were under the influence of an intoxicant. Do you understand that?

DEFENDANT: Yes.

THE COURT: Do you know what the maximum penalty could be if you are found guilty?

DEFENDANT: I believe so.

THE COURT: What do you think it is?

DEFENDANT: \$730 fine, ten days in jail.

THE COURT: No, the maximum penalty is a thousand dollar fine, six months in jail, and revocation of your license for 18 months. Do you understand that?

DEFENDANT: Yes.

¶3 The trial court denied Denninger's motion to dismiss the penalty enhancer. It concluded the 1993 transcript revealed Denninger was aware of the difficulties and disadvantages of self-representation. After a bench trial, the court found Denninger guilty and sentenced him to eighty days in jail, ordered him to pay \$1,930 in fines and costs, revoked his driver's license for twenty-seven months, and ordered an alcohol assessment and an ignition lock. Denninger appeals.

DISCUSSION

¶4 A defendant may collaterally attack a waiver of counsel for a prior conviction if that prior conviction is the basis for an enhanced penalty. *State v. Peters*, 2001 WI 74, ¶22, 244 Wis. 2d 470, 628 N.W.2d 797. Whether a defendant has knowingly, voluntarily, and intelligently waived his or her right to counsel requires the application of constitutional principals to the facts of the case, which we review independently of the trial court. *State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). In *Klessig*, our supreme court modified the requirements for a valid waiver of counsel. *Id.* at 206. Before *Klessig*, an appellate court would find a valid waiver if the record reflected a deliberate choice to proceed without counsel and an awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges, and the general range of penalties in the event the accused is found guilty. *Id.* at 205 (citing *Pickens v. State*, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980)). *Klessig*,

however, overruled *Pickens* to mandate the trial court engage the defendant in a colloquy specifically addressing these concerns. *Klessig*, 211 Wis. 2d at 206.

¶5 In this case, we apply the older *Pickens* standard because that was the controlling standard at the time of Denninger's 1993 conviction. See *Peters*, 2001 WI 74 at ¶20. Thus, we must determine whether the record as a whole reflects a valid waiver of counsel. We conclude it does not.

¶6 Nothing in the 1993 transcript reveals that Denninger was aware of the difficulties and disadvantages of self-representation. The transcript establishes Denninger's level of education, his awareness of his right to counsel if indigent, that no one had told him to come to court without counsel, and that Denninger was aware that he was waiving his right to counsel by pleading guilty. The trial court concluded this was adequate to support a finding that Denninger validly waived counsel. Specifically, the court relied on the 1993 court's question regarding Denninger's education and that it informed him of the correct penalty for his crime. The court here also noted that the 1993 court informed Denninger of his rights he was waiving with his guilty plea.

¶7 We cannot conclude, however, that this amounts to a valid waiver because nothing in the record reveals Denninger understood the disadvantages and difficulties of representing himself. That the 1993 court asked Denninger about his education is relevant to his ability to proceed pro se, but does not establish that he understood the advantages of having counsel. Similarly, the trial court's correction of Denninger's mistaken belief shows he was aware of the potential penalties and seriousness of the crime. This, however, is a separate factor from understanding the difficulties and disadvantages of self-representation. Finally, the 1993 court's informing Denninger of what rights he was waiving with a guilty

plea is required as part of the plea colloquy, not a waiver of counsel. These are rights Denninger would have had regardless of whether he had counsel. His understanding of these rights does not show he understood the benefits of proceeding with counsel.

¶8 Consequently, the judgment must be amended to reflect a conviction for OWI without considering Denninger's 1993 conviction. Additionally, on remand the court must resentence Denninger without considering that conviction.

By the Court.—Judgment reversed and cause remanded with directions.

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